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# City of Burlington v. Dague: When You Wish upon a Lodestar for Reasonable Attorney Fees

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***City of Burlington v. Dague: When You Wish Upon A Lodestar For Reasonable Attorney Fees***

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The United States is virtually the *only* country in the *world* that does not award attorney fees to the party prevailing in a lawsuit.<sup>1</sup> Under the “American Rule,” both parties pay their own attorney fees.<sup>2</sup> Virtually every other legal system follows the “English Rule,” where the losing party pays the prevailing party’s attorney fees.<sup>3</sup>

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1. WALTER K. OLSON, *THE LITIGATION EXPLOSION* 329-30 (1991); Joyce Dougherty, *After Alyeska: Will Public Interest Litigation Survive*, 16 SANTA CLARA L. REV. 257, 268 (1976) [hereinafter *After Alyeska*].

2. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); Bradley L. Smith, Comment, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2154 n.1 (1992) [hereinafter *Settlement Incentives*]. The United States Supreme Court reaffirmed the American Rule in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *Id.* The American Rule denies access to the courts to a large group of persons who lack both the sufficient resources to hire attorneys, and seek only nominal or equitable damages, thus making a contingency fee arrangement impracticable. H.R. REP. NO. 1558, 94th CONG., 2D SESS. (1976); S. REP. NO. 1011, 94th CONG., 2D SESS. (1976); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 749 (1987) (Blackmun, J., dissenting).

3. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.9, at 537 (3d ed. 1986) [hereinafter *ECONOMIC ANALYSIS*]; *Settlement Incentives*, *supra* note 2, at 2154. In response to criticisms against the American Rule, a few commentators recommend adopting a modified form of the English Rule to encourage pre-trial settlement of claims and reduce litigation. *Id.* (citing PRESIDENT’S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 1, 24-25 (1991)). The President’s Council on Competitiveness, formerly chaired by Vice-President Dan Quayle, has recommended adopting a modified form of the English Rule in diversity cases, which would award attorney fees to the prevailing party. *Id.* This modified rule would limit indemnification

Congress and the state legislatures recognized that the American Rule could lead to harsh results, and created numerous statutory exceptions which shift attorney fees to the non-prevailing party.<sup>4</sup> In fact, Congress has significantly restricted the scope of the American Rule by enacting nearly two hundred federal fee shifting statutes.<sup>5</sup> The California Legislature has enacted 235 fee shifting statutes.<sup>6</sup> These provisions encourage private parties to enforce important federal and state statutes, by shifting the winning

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of the winning party's attorney fees to the losing party's own legal fees. *Id. Contra* Ralph Nader, Public Citizen press release (Aug. 13, 1992), quoted in *Daily Rep. for Executives* (BNA), Aug. 14, 1991, at A3 (stating that large corporations would use this new rule to intimidate victims, by increasing the financial risks of losing a case); Herbert M. Kritzer, *The English Rule*, ABA J., Nov. 1992, at 55-57 [hereinafter *The English Rule*] (stating that settlement offers in England are significantly lower for plaintiffs who pay their own solicitors, versus those cases where either legal aid or a labor union pays the attorney); *id.* (explaining how a modified English Rule would almost certainly increase, rather than decrease, the amount of litigation).

4. Fee shifting statutes typically require the "non-prevailing party" to pay the attorney fees of the "prevailing party." See *infra* notes 53, 56 and accompanying text (examining the language of fee shifting statutes); *infra* notes 44-67 and accompanying text (describing fee shifting statutes); see also CAL. CIV. CODE § 1717(b)(1) (West Supp. 1993) (defining "prevailing party" as the party who recovers greater relief in the action); *id.* (stating that if the case is dismissed, there is no prevailing party); CAL. CIV. PROC. CODE § 1032 (West Supp. 1993) (defining "prevailing party" as a defendant who obtains a dismissal, a defendant where neither party obtains relief, or the party whom the court determines is the prevailing party).

5. Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1232 (1988) [hereinafter *Low-Income Litigants*]; Charles Silver, Comment, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 872 (1992) [hereinafter *New Fee Award Procedure*]; see HERBERT B. NEWBERG, ATTORNEY FEE AWARDS, § 28.01, at 478 (1986 & Supp. 1993) [hereinafter ATTORNEY FEE AWARDS] (listing 136 federal fee shifting provisions); *New Fee Award Procedure, supra*, at 866 (explaining how Congress has limited the effects of the American Rule). The Supreme Court recognized that Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in direct response to the Court's affirmation of the American Rule. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

6. See *Attorney Fees*, 1984 CAL. CONTINUING EDUC. B. § 1.311, at 253-67 (listing 235 California fee shifting provisions).

party's attorney fees to the losing party.<sup>7</sup> These provisions also deter violations of the statutes.<sup>8</sup>

Under the exceptions to the American Rule, there are three primary methods for calculating attorney fees. First, the statute itself may expressly mandate a certain calculation of attorney fees.<sup>9</sup> The Fifth Circuit Court of Appeals developed a second approach, under which the court considers twelve factors to determine reasonable attorney fees.<sup>10</sup> The Third Circuit Court of Appeals developed a third, more straight-forward approach which calculates reasonable attorney fees by multiplying the number of hours reasonably expended by a reasonable hourly rate.<sup>11</sup> The United States Supreme Court adopted the latter approach, naming

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7. For example, the purpose of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, "is to ensure 'effective access to the judicial process' for persons with civil rights grievances." H.R. REP. NO. 1558, 94th CONG., 2D SESS. (1976). Requiring the non-prevailing party to pay the prevailing party's attorney fees leads to increased access to the courts, because an attorney is more likely to take a case when the attorney has a higher probability of getting paid. *See infra* notes 311-14 and accompanying text (discussing the risk aversion of lawyers). Many plaintiffs can neither afford to pay an hourly fee, nor offer a contingent fee, since they are seeking only declaratory or nominal relief. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2645 (1992) (Blackmun, J., dissenting). However, under the fee shifting provisions, if the attorney is successful, the attorney will be paid by the other party. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983).

8. *Riverside v. Rivera*, 477 U.S. 561 (1986); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *New Fee Award Procedure*, *supra* note 5, at 873-74.

9. *See, e.g.*, CAL. CIV. PROC. CODE § 1031 (West Supp. 1993) (providing that an award of attorney fees cannot exceed 20% of the amount of recovery); CAL. GOV'T CODE § 800 (West Supp. 1993) (providing that an award of attorney fees should be computed at a rate of \$100 per hour, and should not exceed \$7,500). Fee shifting statutes are more typically drafted in broad terms, leaving to the courts the task of devising equitable procedures to calculate attorney fees. *New Fee Award Procedure*, *supra* note 5, at 866. Under these fee shifting statutes, courts seek to determine reasonable attorney fees. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (recognizing that the Civil Rights Attorney's Fees Awards Act of 1976 requires determining a "reasonable fee"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding that the district court must determine what fee is "reasonable").

10. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); *see infra* notes 83-85 and accompanying text (discussing the twelve *Johnson* factors for determining reasonable attorney fees).

11. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (Lindy D), 487 F.2d 161, 167-68 (3rd Cir. 1973). In applying the lodestar model, the trial court generally derives a reasonable rate from local rates charged by attorneys of comparable experience, skill, and reputation. *New Fee Award Procedure*, *supra* note 5, at 867; *see ATTORNEY FEE AWARDS*, *supra* note 5, at § 29.01, at 488 (listing market rates upheld by each federal circuit).

it the lodestar model, and recognized that the lodestar could be enhanced by using the factors identified by the Fifth Circuit.<sup>12</sup>

The lodestar merely provides the basic calculation of reasonable attorney fees, and does not reflect all of the factors that determine the market value of legal services.<sup>13</sup> Courts have, therefore, attempted to fully compensate attorneys by enhancing the lodestar based on three factors: Delay in payment, exceptional results, and the contingent nature of recovery.<sup>14</sup> By enhancing the lodestar for these factors, the trial court raises what would otherwise be an unreasonably low fee, to a fee which better approximates the true market value of an attorney's services.<sup>15</sup>

The Supreme Court, in *City of Burlington v. Dague*,<sup>16</sup> recently eliminated an enhancement to the lodestar figure for the contingent risk of nonrecovery.<sup>17</sup> Although the Court limited its holding to eliminating contingency enhancements under the Solid Waste Disposal Act<sup>18</sup> and the Clean Water Act,<sup>19</sup> the Court intended for its decision to have a broader effect.<sup>20</sup>

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12. *Hensley*, 461 U.S. at 434; *Blum*, 465 U.S. at 897; see *infra* notes 68-110 and accompanying text (discussing the evolution of the lodestar approach).

13. ATTORNEY FEE AWARDS, *supra* note 5, § 4.31, at 163.

14. *Id.*; *Hensley*, 461 U.S. at 434 n.9. A multiplier that enhances the basic lodestar calculation for one of these factors does not represent a bonus or windfall to the attorney. *Blum*, 465 U.S. at 896 n.12, 897; ATTORNEY FEE AWARDS, *supra* note 5, § 4.29, at 161; see *infra* notes 111-170 and accompanying text (discussing the three enhancements to the lodestar figure).

15. *Weinberger v. Great Northern Nekoosa Corp.*, Nos. 89-0270, 89-0273, 89-0291, 1992 U.S. Dist. LEXIS 12073, at \*62-63 (D. Me. July 30, 1992) (citing 2 M.DERFNER & A.WOLF, COURT AWARDED ATTORNEYS FEES § 16.04[1], at 16-122). These enhancements for delay in payment, exceptional results, and the contingent nature of recovery, compensate counsel for prosecuting cases where the probability of success is only moderate, and yet the attorney must invest substantial time. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 236 (2d Cir. 1987) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974)).

16. 112 S. Ct. 2638 (1992).

17. *Dague*, 112 S. Ct. at 2643-44; see *infra* notes 171-244 and accompanying text (discussing the *Dague* decision). The lodestar may still be enhanced for delay in payment and exceptional results. See *infra* notes 388-96 and accompanying text (explaining how *Dague* only eliminated an enhancement for the contingent nature of recovery).

18. 42 U.S.C. § 6901 (1988).

19. 33 U.S.C. § 1311 (1988); see *infra* notes 58-59 and accompanying text (discussing these two environmental protection statutes).

20. *Dague*, 112 S. Ct. at 2643-44; see *infra* notes 321-23 and accompanying text (discussing the language in *Dague* which was meant to be, and has been interpreted broadly).

This Note analyzes the reasoning and ramifications of *City of Burlington v. Dague*.<sup>21</sup> Part I surveys fee shifting statutes, primarily in the civil rights and environmental areas, and examines the development of the lodestar approach.<sup>22</sup> Part II describes the facts and procedural history of *City of Burlington v. Dague* and reviews the majority and dissenting opinions.<sup>23</sup> Finally, Part III examines the added confusion in fee shifting jurisprudence created by *Dague*, and the possibility of circumventing the *Dague* decision. Part III also discusses the role Congress and state legislatures should take in modifying fee shifting statutes.<sup>24</sup>

### I. LEGAL BACKGROUND

In order to understand fee shifting jurisprudence, it is necessary to contrast the traditional American method of compensating attorneys with the traditional English method. The contrast between the two rules provides the backdrop for a survey of fee shifting statutes in the federal civil rights and environmental protection arenas, and similar statutes in the State of California.<sup>25</sup> Fee shifting statutes permit courts to award attorney fees, but do not define what constitutes *reasonable* attorney fees, leading to the development of the lodestar model.<sup>26</sup> Yet the lodestar figure cannot account for all of the variables that determine a fully compensatory fee, and therefore, the court must enhance the lodestar for certain unaccounted factors.<sup>27</sup>

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21. 112 S. Ct. 2638 (1992).

22. See *infra* notes 25-170 and accompanying text.

23. See *infra* notes 171-244 and accompanying text.

24. See *infra* notes 245-413 and accompanying text.

25. See *infra* notes 44-67 and accompanying text (discussing federal and California fee shifting statutes).

26. See *infra* notes 68-110 and accompanying text (discussing the development of the lodestar model).

27. See *infra* notes 111-170 and accompanying text (discussing the possible enhancements to the lodestar).

A. *English Rule vs. American Rule*

The English Rule requires the losing party to pay the prevailing party's attorney fees.<sup>28</sup> All major common law countries, other than the United States, follow the English Rule.<sup>29</sup> English courts routinely grant attorney fees and all other litigation expenses to prevailing parties, and have done so for centuries.<sup>30</sup> The object of the English Rule is to indemnify the successful party for the expense of vindicating the successful party's legal rights.<sup>31</sup>

The American Rule, on the other hand, requires both parties to pay their own attorney fees.<sup>32</sup> The American Rule has consistently been upheld by the United States Supreme Court.<sup>33</sup> In 1796, the Court first stated, in *Arcambel v. Wiseman*,<sup>34</sup> that the "general practice" in the United States was to not award attorney fees as part of damages.<sup>35</sup> The Court ruled that federal courts could not deviate from the general practice without express authorization from Congress.<sup>36</sup> A strict application of the American Rule leads to harsh results, because many potential plaintiffs possess neither the financial resources nor the possibility of obtaining a sufficiently

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28. E.g., ECONOMIC ANALYSIS, *supra* note 3, § 21.9, at 537; *Settlement Incentives*, *supra* note 2, at 2154.

29. See Neil Williams, *Fee Shifting and Public Interest Litigation*, 64 A.B.A. J. 859, 859 (1978) [hereinafter *Fee Shifting*] (noting that the American practice may be the most distinctive feature of American Civil Procedure); *After Alyeska*, *supra* note 1, at 268 (stating that the American practice differs from almost every other country in the world).

30. Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 678 (1983) [hereinafter *Unsuccessful Environmental Litigants*].

31. *Fee Shifting*, *supra* note 29, at 859. The author states that the English Rule in modern practice only partially indemnifies the prevailing party, because of fee schedules which set limits on attorney fees. *Id.* at 860; see also Herbert M. Kritzer, *Searching for Winners in a Loser Pays System*, A.B.A. J., Nov. 1992, at 55 (explaining that different methods of financing litigation insulate parties from being individually responsible for paying the prevailing party's attorney fees).

32. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

33. See, e.g., *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 126-31 (1974); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967); *Stewart v. Sonneborn*, 98 U.S. 187 (1879); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450 (1873); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852).

34. 3 U.S. (3 Dall.) 306 (1796).

35. *Arcambel*, 3 U.S. at 306.

36. *Id.*

large recovery to attract competent counsel.<sup>37</sup> If courts followed the American Rule strictly, this would prevent many plaintiffs from bringing meritorious claims.

Courts have mitigated the harshness of the American Rule by employing equitable principles that shift the prevailing party's attorney fees to the non-prevailing party.<sup>38</sup> Legislatures also have mitigated the harshness by enacting statutes which shift fees.<sup>39</sup> In mitigating the harshness of the American Rule, courts and legislatures have developed three equitable principles: The common fund, substantial benefit, and private attorney general doctrines. The common fund doctrine permits a litigant, whose efforts have created a fund from which others obtain benefit, to require the beneficiaries to contribute to the costs of litigation, including attorney fees.<sup>40</sup> The substantial benefit doctrine permits a litigant, whose efforts have procured a judgment that confers a substantial benefit on members of an ascertainable class, to recover attorney fees from the class.<sup>41</sup> Finally, the private attorney general doctrine awards attorney fees in successful suits against persons infringing on important statutory and constitutional rights.<sup>42</sup> The private attorney general doctrine encourages suits that enforce a strong public policy and benefit a large class of people.<sup>43</sup> Each of these three doctrines at least partially indemnifies the prevailing party's attorney fees.

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37. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 749 (1987) (Blackmun, J., dissenting); H.R. REP. NO. 1558, 94th CONG., 2D SESS. (1976); S. REP. NO. 1011, 94th CONG. 2D SESS. (1976).

38. *Serrano v. Priest (Serrano III)*, 20 Cal. 3d 25, 35, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 318 (1977) (citing *Quinn v. State*, 15 Cal. 3d 162, 167, 539 P.2d 761, 764, 124 Cal. Rptr. 1, 4 (1975)); see *supra* note 4 and accompanying text (defining "prevailing party").

39. See, e.g., CAL. CIV. CODE § 1717 (West 1985 & Supp. 1993) (permitting parties to a contract to provide for fee shifting in the event of litigation); CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1993) (codifying the private attorney general doctrine).

40. *Serrano III*, 20 Cal. 3d at 35, 569 P.2d at 1309, 141 Cal. Rptr. at 318.

41. *Id.*

42. *Woodland Hills Residents Ass'n. v. City Council*, 23 Cal. 3d 917, 933, 593 P.2d 200, 208, 154 Cal. Rptr. 503, 511 (1979).

43. *Id.*

*B. Fee Shifting Statutes*

The primary purpose of fee shifting statutes is to make legal services available to plaintiffs who might be discouraged or foreclosed from bringing actions under the American Rule. Most statutory fee shifting cases involve plaintiffs who seek only nominal damages, equitable relief, or do not contract to pay their attorneys a predetermined contingency percentage.<sup>44</sup> In the absence of fee shifting provisions, a plaintiff who cannot afford to pay an hourly fee would be unable to attract counsel.<sup>45</sup> Since a plaintiff's ability to attract competent counsel depends on the certainty of payment to the attorney, fee shifting provisions aid plaintiffs in attracting counsel by increasing the likelihood that an adequate source will be available from which counsel will be paid.<sup>46</sup>

Fee shifting also bolsters enforcement of important state and federal laws.<sup>47</sup> Legislatures have chosen to encourage claims in particular areas by offering attorney fee awards. Due to these fee shifting provisions, private plaintiffs who seek to enforce important laws can attract competent counsel.<sup>48</sup> The United States Congress and the California Legislature have enacted a plethora of fee shifting provisions.<sup>49</sup>

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44. *Settlement Incentives*, *supra* note 2, at 2168; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 749 (1987) (Blackmun, J., dissenting).

45. See S. REP. NO. 1011, 94th CONG., 2D SESS. (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976); *Settlement Incentives*, *supra* note 2, at 2168 (stating that plaintiffs seeking nonpecuniary relief should be able to attract competent counsel with fees equivalent to those available in other types of litigation).

46. *Delaware Valley II*, 483 U.S. at 736, 742-43 (Blackmun, J., dissenting).

47. S. REP. NO. 1011, 94th CONG., 2D SESS. (1976).

48. *Delaware Valley II*, 483 U.S. at 742-43 (Blackmun, J., dissenting).

49. See *infra* notes 50-67 and accompanying text (discussing federal and California fee shifting statutes).

### *1. Federal Fee Shifting Statutes*

Congress has passed nearly 200 fee shifting statutes.<sup>50</sup> Federal fee shifting statutes are quite diverse, and cover a wide range of legal areas.<sup>51</sup> Despite the breadth of federal fee shifting statutes, Congress appears to have focused its attention on the civil rights and environmental protection arenas.<sup>52</sup>

Federal civil rights statutes typically limit recovery to the “prevailing,” “substantially prevailing,” or “successful” party.<sup>53</sup> Civil rights statutes can be classified according to how much discretion the trial court has in awarding attorney fees. The majority of civil rights statutes *permit* the court to award attorney

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50. *Low-Income Litigants*, *supra* note 5, at 1232; *New Fee Award Procedure*, *supra* note 5, at 872; see ATTORNEY FEE AWARDS, *supra* note 5, § 28.01, at 478 (listing 136 federal fee shifting provisions).

51. *New Fee Award Procedure*, *supra* note 5, at 872.

52. *Id.* at 873-74; see *infra* notes 59-112 and accompanying text (listing examples of civil rights and environmental statutes which permit fee shifting). Congress has also passed fee shifting provisions in areas other than civil rights and environmental protection. See, e.g., Copyright Act of 1976, 17 U.S.C. § 505 (1988) (stating that the court may award attorney fees to the prevailing party, but they may not be awarded either to or against the United States government); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2060(f), 2072(a), 2073 (1988) (permitting the court to award attorney fees, even against the United States government, if in the interest of justice); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1988) (stating that attorney fees may be awarded against the United States government); Securities Acts of 1933 and 1934, 15 U.S.C. §§ 77k(e), 78r(a) (1988) (permitting attorney fees to be awarded to either party, especially if the suit or defense was without merit); Clayton Act, 15 U.S.C. § 15 (1988) (stating that the prevailing plaintiff shall recover attorney's fees); Age Discrimination Act, 42 U.S.C. § 6104(e)(1) (1988) (requiring the court to award attorney fees to the prevailing plaintiff, on proper motion); Interstate Commerce Act, 49 U.S.C. §§ 11705(d)(3), 11710(b), 11711(d) (1988) (mandating that the court award attorney fees to the prevailing plaintiff); Interstate Commerce Act, 49 U.S.C. § 11708(c) (1988) (stating that the court may award attorney fees to the prevailing plaintiff); Interstate Commerce Act, 49 U.S.C. § 11711(e) (1988) (permitting the court to award attorney fees to the defendant if the action was brought in bad faith).

53. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983).

fees.<sup>54</sup> The remaining civil rights statutes *require* the trial court to grant an attorney fee award.<sup>55</sup>

Federal environmental protection statutes also typically restrict attorney fee awards to “prevailing” or “substantially prevailing” parties.<sup>56</sup> Federal environmental protection statutes can be classified on two parameters: How much discretion the trial court has in awarding attorney fees, and to whom the trial court can award attorney fees. Some environmental statutes *may* permit the court to grant attorney fee awards to *any party*.<sup>57</sup> Other

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54. See, e.g., Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a (1988) (permitting the court to award reasonable attorney fees to parties who prevail in a claim of racial discrimination in places of public accommodation); *id.*, Title VII, 42 U.S.C. §§ 2000e-2, 2000e-5(k) (1988) (racial discrimination in employment practices); Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997a(b), 1997c(d) (1988) (parties residing in an institution who prevail in a claim for deprivation of civil rights); Fair Housing Act of 1968, 42 U.S.C. §§ 3604-3610, 3612(p) (1988) (discrimination in the sale or lease of housing on the basis of race, religion, sex, handicap, or familial status); Equal Access to Justice Act, 5 U.S.C. § 504 (1988), 28 U.S.C. §§ 2412, 2412(b), 2412(d)(1)(A) (1988) (tort claim against the United States); Civil Rights Attorneys’ Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988) (seven types of civil rights claims: 42 U.S.C. § 1981 (1988) (equal rights); 42 U.S.C. § 1982 (1988) (property rights); 42 U.S.C. § 1983 (1988) (deprivation of civil rights under color of state law); 42 U.S.C. § 1985 (1988) (conspiracy to interfere with civil rights); 42 U.S.C. § 1986 (1988) (failing to act to *prevent* a conspiracy to deprive the parties of civil rights); 20 U.S.C. § 1681 (1988) (discrimination in education, or in a program receiving federal funds, on the basis of sex); 42 U.S.C. § 2000d (1988) (racial discrimination by recipients of federal funds)). See generally 7 B. E. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 161 (1985 & Supp. 1992) (discussing the Civil Rights Attorneys’ Fees Awards Act of 1976). Congress adopted § 1988 in response to the United States Supreme Court’s decision in *Alyeska Pipeline. Hensley*, 461 U.S. at 429; see *Alyeska*, 421 U.S. at 249-50 (affirming the American Rule).

55. See, e.g., 28 U.S.C. § 2412(d)(1)(A) (1988) (requiring the court to award attorney fees to the prevailing party in a non-tort, civil case against the United States); 5 U.S.C. § 504(a)(1) (1988) (adversarial hearing before an administrative agency); Fair Labor Standards Act, 29 U.S.C. §§ 206, 216(b) (1988) (violations of provisions on minimum wages); *id.*, 29 U.S.C. § 207 (1988) (maximum work hours without compensation for overtime); *id.*, 29 U.S.C. § 215(a)(3) (1988) (discrimination against employees who have filed suit for violation of fair labor standards).

56. See *supra* note 4 and accompanying text (examining statutes which define “prevailing party”). A party need not succeed on the merits of the case in order to be considered “prevailing” for the purposes of statutory fee awards. E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY’S FEES 62-74 (1981), cited in *Unsuccessful Environmental Litigants*, *supra* note 30, at 677. Under these provisions, courts may award attorney fees to plaintiffs who obtain relief through settlements or consent decrees, or even those who act as “catalysts” to modify defendants’ behavior. *Id.*

57. See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531, 1533, 1534, 1538, 1540(g)(4) (1988) (prohibitions on importing, exporting, taking, possessing, selling, carrying, transporting, shipping, delivering, receiving, selling, offering, removing, damaging, destroying, or trading endangered or threatened species or their components); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401, 1411, 1415(g)(4) (1988) (prohibition against the dumping of any material in ocean waters from vessels registered in the United States, or any vessel in United States ocean

environmental protection statutes *permit* the court to award attorney fees only when *appropriate*.<sup>58</sup> Finally, a few environmental statutes *require* the court to grant attorney fee awards to prevailing

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waters); Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901, 1902, 1905, 1907, 1910(d) (1988) (prohibition against discharge of oil, noxious liquid substances, or garbage from ships of United States registry, or any ship while in the navigable waters of the United States, unless ships comply with a certain discharge protocol).

58. *See, e.g.*, Toxic Substances Control Act (ToSCA), 15 U.S.C. §§ 2601, 2603(a)(2), 2604(b)(4), 2605(a), 2618(a)(1)(A), 2618(d), 2619(a)(1), 2619(c)(2) (1988) (permitting a court to award reasonable attorney fees, if the court determines that such an award is "appropriate" to enforce the Act's prohibitions on manufacture, distribution, processing, use or disposal of certain hazardous substances); Federal Water Pollution Prevention and Control Act (Clean Water Act), 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, 1344, 1365(d) (1988) (suits brought by private citizens to enforce the prohibition against discharging any pollutant in a manner not in compliance with its mandates); Solid Waste Disposal Act, 42 U.S.C. §§ 6901, 6902, 6907, 6913, 6921, 6972(e) (1988) (suits brought by private citizens to enforce the Act, which develops guidelines, provides technical assistance for solid waste management, and regulates hazardous waste); Clean Air Amendments of 1970 (Clean Air Act), 42 U.S.C. §§ 7401, 7403, 7404, 7407, 7408, 7604(d) (1988) (suits brought by private citizens to enforce the Act, which funds research, delegates the responsibility for assuring air quality to each state, and establishes national air quality standards); *id.* § 7607(f) (person challenging the Environmental Protection Agency's (EPA's) national emission standards); *id.* § 7413(b) (EPA unreasonably brings suit against the owner or operator of a major stationary source of pollution). The scope of the term "appropriate" as used in section 7607(f) was considered in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). There, the plaintiffs challenged emission standards set by the EPA and lost. *Ruckelshaus*, 463 U.S. at 681. However, despite the plaintiffs' lack of success, the trial judge awarded the plaintiffs' attorney fees. *Id.* at 682. The appellate court affirmed the judgment. *Id.* The United States Supreme Court reversed, and held that other federal fee shifting provisions reflect the consistent rule that "[a] successful party need not pay its unsuccessful adversary's fees." *Id.* at 685. The Court also noted that the legislative history of The Clean Air Act showed that the Act was not designed to reject this rule, but merely to expand it to include *partially* prevailing parties. *Id.* at 686. The Court held that it was inappropriate for a federal court to award attorney fees under § 7607(f), unless the party at least *partially* prevailed. *Id.* at 694. *See also* Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, 9605(a), 9611(a), 9612(c)(3) (1988) (giving the United States President authority to request the Attorney General to recover any costs paid out of Superfund, including attorney fees, from any person liable for the environmental cleanup).

parties.<sup>59</sup> California fee shifting statutes can be similarly classified.<sup>60</sup>

## 2. *California Fee Shifting Statutes*

The California Legislature has indicated that, unless a relevant statute specifically provides for attorney fees, the fees are left to any agreement between the parties.<sup>61</sup> To date, the Legislature has promulgated over 200 fee shifting statutes, which can be found in almost every one of the State's codes.<sup>62</sup>

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59. See, e.g., Federal Water Pollution Prevention and Control Act (Clean Water Act), 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, 1344, 1367(c) (1988) (suits brought by employees who are discharged in retaliation for instituting or testifying in a proceeding under the Act, which prohibits discharging any pollutant in a manner not in compliance with its mandates); Clean Air Amendments of 1970 (Clean Air Act), 42 U.S.C. §§ 7401, 7403, 7404, 7407, 7408, 7622(b)(2)(B) (1988) (suits brought by employees who are discharged in retaliation for instituting or testifying in a proceeding under the Act, which funds research, delegates the responsibility for assuring air quality to each state, and establishes national air quality standards); Solid Waste Disposal Act, 42 U.S.C. §§ 6901, 6902, 6907, 6913, 6921, 6971(e) (1988) (suits brought by employees who are discharged in retaliation for instituting or testifying in a proceeding under the Act, which develops guidelines, provides technical assistance for solid waste management, and regulates hazardous waste).

60. See *infra* notes 61-67 and accompanying text (surveying California fee shifting statutes).

61. CAL. CIV. PROC. CODE § 1021 (West Supp. 1993).

62. See *Attorney Fees*, 1984 CAL. CONTINUING EDUC. B. § 1.311, at 253-67 (listing 235 California fee shifting provisions); see, e.g., CAL. BUS. & PROF. CODE §§ 7044, 7168 (West Supp. 1993); CAL. CIV. CODE §§ 789.3(d), 798.85, 1714.1(b), 1717, 1788.30(c), 1798.46, 1798.48(b), 1798.53, 1799.2, 1811.1, 1942.5, 2983.4, 2988.9, 3250 (West 1985 & Supp. 1993); CAL. CIV. PROC. CODE §§ 730, 731.5 (West 1980 & 1987); CAL. EDUC. CODE § 43048(b) (West Supp. 1993); CAL. GOV'T CODE § 19765 (West 1980); CAL. PUB. RES. CODE § 25455 (West 1986); CAL. PUB. UTIL. CODE § 453 (West Supp. 1993) (providing that the court *shall* award attorney fees to the prevailing party); CAL. CIV. CODE §§ 815.7, 1584.5, 1584.6, 2528 (West Supp. 1993); CAL. CIV. PROC. CODE §§ 396b, 527.6(h), 1021.5, 1021.6 (West Supp. 1993); CAL. FIN. CODE §§ 865.6(e), 15153(d), 18333(e) (West 1989); CAL. GOV'T CODE §§ 11130.5, 54960.5, 91012 (West 1980 & Supp. 1993) (providing that the court *may* award attorney fees to the prevailing party); CAL. BUS. & PROF. CODE §§ 10238.7, 16750(a), 17082, 21140.4 (West 1987 & Supp. 1993); CAL. CIV. CODE §§ 1747.50(c), 1747.60(c), 1747.70(d), 1785.31(d), 1786.50(a)(2), 1787.3, 1812.34, 1812.123(a) (West 1985); CAL. CIV. PROC. CODE §§ 491.160, 1030, 1031(c), 1235.140(b), 1245.060(b) (West Supp. 1993); CAL. CORP. CODE § 27200 (West 1977); CAL. EDUC. CODE § 67139.5 (West 1989); CAL. HEALTH & SAFETY CODE § 7109 (West 1970); CAL. INS. CODE §§ 11629, 11708 (West 1988); CAL. LAB. CODE §§ 432.7(b), 3709, 3709.5, 3856, 3860, 5801 (West 1985 & Supp. 1993); CAL. PENAL CODE §§ 496, 593d (West Supp. 1993); CAL. STS. & HIGH. CODE §§ 5412, 6615, 8831, 9354 (West 1969 & Supp. 1993); CAL. UNEMP. INS. CODE § 1957 (West 1986); CAL. WELF. & INST. CODE §§ 10962, 19709 (West 1984 & 1991) (providing that the court *shall* award attorney fees to the successful plaintiff or *injured party*); CAL. BUS. & PROF. CODE §§ 21202, 22386 (West 1987); CAL. CIV. CODE §§ 52(a), 54.3, 56.35, 1794, 1794.1(a), 1794.1(b), 1812.62(a), 1812.94(a) (West 1985 & Supp. 1993); CAL. CIV. PROC. CODE §§ 482.110(b), 491.130, 585(a) (West Supp. 1993); CAL. EVID. CODE § 1158 (West

California fee shifting statutes can be classified, like their federal counterparts, according to how much discretion the provision gives the trial court to award attorney fees. Approximately sixty percent of the fee shifting statutes *mandate* the award of attorney fees.<sup>63</sup> The remaining fee shifting statutes *permit* the courts to award attorney fees.<sup>64</sup>

Although both Congress and the California Legislature have enacted a plethora of fee shifting statutes, these provisions rarely explain how the court is to compute "reasonable" attorney fees.<sup>65</sup> Therefore, Congress and the California Legislature have entrusted the task of developing methods for calculating reasonable attorney fees to the courts.<sup>66</sup> Courts developed two slightly different methods for calculating reasonable attorney fees: The lodestar reasonable fee model, and the *Johnson* twelve factor approach. The United States Supreme Court has adopted the lodestar model, but

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Supp. 1993); CAL. GOV'T CODE §§ 800, 13965(c), 13973(e), 31536 (West 1980 & Supp. 1993); CAL. HEALTH & SAFETY CODE § 26850.5(b) (West Supp. 1993); CAL. INS. CODE § 1619 (West Supp. 1993); CAL. LAB. CODE §§ 4555, 4607, 4903.2, 5410.1, 5710 (West 1989); CAL. PENAL CODE § 653.60 (West 1988) (providing that the court *may* award attorney fees to the plaintiff or *injured party*).

63. See *Attorney Fees*, 1984 CAL. CONTINUING EDUC. B. § 1.311, at 253-67 (listing 235 California fee shifting provisions); see, e.g., CAL. CIV. PROC. CODE § 532(b) (West 1979 & Supp. 1993) (requiring a court to award attorney fees to a plaintiff who has successfully sought an injunction to prevent the diversion of waters to be used for irrigation or domestic purposes); CAL. CORP. CODE § 800(d) (West 1990) (requiring the plaintiff in a shareholder derivative suit to post a bond to cover the corporation's attorney fees if the class action is unsuccessful); CAL. CIV. PROC. CODE § 1036 (West 1980) (requiring the court in an inverse condemnation action to award attorney fees to the prevailing plaintiff).

64. See *Attorney Fees*, 1984 CAL. CONTINUING EDUC. B. § 1.311, at 253-67 (listing 235 California fee shifting provisions); see, e.g., CAL. LAB. CODE § 1197.5(g) (West 1989) (granting the court discretion to award attorney fees to the prevailing party in an action to recover wages lost due to sex discrimination); California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12940, 12941, 12965(b) (West 1993) (employment discrimination on the basis of race, religion, handicap, medical condition, marital status, sex, or age); *id.* § 12955 (West 1993) (housing discrimination on the basis of race, religion, sex or marital status); CAL. CIV. PROC. CODE § 1021.4 (West Supp. 1993) (action for damages brought by a victim against the convicted felon); *id.* § 128.5 (West 1991 & Supp. 1993) (party has used bad faith, dilatory tactics, or brought frivolous actions).

65. See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2060(f) (1988) (defining reasonable attorney fees as based on the actual time the attorney spent on the case and the prevailing rate for similar services).

66. *New Fee Award Procedure*, *supra* note 5, at 866; see *infra* notes 68-110 and accompanying text (discussing the development of the lodestar model).

realized that the lodestar can be enhanced by certain *Johnson* factors.<sup>67</sup>

### C. *Development of Lodestar Model*

#### 1. *Pre-Lodestar Predicament*

Aside from pro bono cases, lawyers in the United States are generally paid either a certain fee, regardless of the suit's outcome, or a contingent fee, which depends upon the success of the litigation. Under either variation on the American Rule, neither the reasonableness nor the calculation of attorney fees is generally an issue, as the preferred method is to allow litigants and their lawyers to determine compensation.<sup>68</sup> The common fund doctrine<sup>69</sup> was the earliest exception to this rule, and requires spreading the costs of suit among the beneficiaries.<sup>70</sup> The United States Supreme Court recognized the high value of attorneys' services in common fund cases, and approved awarding a percentage of the fund recovered as compensation to the attorneys.<sup>71</sup> Under the common fund exception, with attorney fees calculated as a percentage of the recovery, the reasonableness of attorney fees became an issue.

Trial courts began to rely on a percentage of the common fund recovered as the appropriate measure of attorney fees.<sup>72</sup> Since appellate courts did not establish guidelines for fee awards, trial courts were free to exercise their discretion.<sup>73</sup> Even a relatively low percentage of a multi-million dollar recovery appears as a windfall attorney fee award. Moreover, in determining an

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67. See *infra* notes 76-110 and accompanying text (discussing the two different approaches, and the adoption of the lodestar model).

68. See CAL. CIV. PROC. CODE § 1021 (West Supp. 1993) (providing that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.").

69. See *supra* note 40 and accompanying text (discussing the common fund doctrine).

70. *Trustees v. Greenough*, 105 U.S. 527, 532-34 (1881).

71. *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885).

72. ATTORNEY FEE AWARDS, *supra* note 5, § 2.02, at 31.

73. *Id.*

appropriate percentage, trial courts would only refer generally to certain considerations, and would not state specifically which factors they considered, or what weight the courts gave to particular factors.<sup>74</sup> Presented with such vague records, appellate courts had difficulty reviewing the attorney fee awards to determine if the awards were reasonable.<sup>75</sup> It was clear to appellate judges that a uniform approach to fee shifting was necessary. The appellate courts developed two approaches: The lodestar approach, and the twelve factor approach.

## *2. Circuit Courts Adopt Two Similar Approaches*

Federal circuit courts of appeals responded to the need for a standard approach to statutory fee shifting in two slightly different ways. In *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp. (Lindy I)*,<sup>76</sup> a shareholder derivative suit, the Third Circuit rejected the trial courts' common practice of awarding attorney fees as a standard percentage of the recovery in class actions.<sup>77</sup> Instead, the Third Circuit adopted a new approach: The trial court would multiply the number of hours reasonably spent on the case by a basic hourly rate for noncontingent work.<sup>78</sup> The court would thus arrive at a reasonable level of compensation, which would be the "lodestar" of the court's fee determination.<sup>79</sup> The court could then adjust the lodestar for the contingent nature of success<sup>80</sup> and the quality of the attorney's work.<sup>81</sup> Based on

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74. *Id.*

75. *Id.* § 2.03, at 32. Apparently this is still a problem today. *See, e.g., Drennan v. General Motors Corp.*, 1992 U.S. App. LEXIS 25613, at \*20 (6th Cir. 1992) (noting that in order for an appellate court to review an attorney fee award, it remains important for the district court to provide a concise but clear explanation of its reasons for the fee award).

76. 487 F.2d 161 (3d Cir. 1973).

77. *Id.* at 166-67.

78. *Id.*; *see infra* notes 152-170 and accompanying text (explaining the significance of using a noncontingent rate in the lodestar calculation).

79. *Lindy I*, 487 F.2d at 167-68.

80. The *Lindy I* court described the "contingent nature of success" as "where . . . the attorney has no private agreement that guarantees payment [of attorney fees] even if no recovery is obtained." *Id.* at 168.

81. *Id.*

this model, the *Lindy I* court subsequently affirmed the trial court's determination that a hundred percent enhancement was warranted, and further elaborated on what considerations a court should focus on in determining whether the basic lodestar figure should be enhanced.<sup>82</sup>

The Fifth Circuit developed a slightly different approach. In *Johnson v. Georgia Highway Express Inc.*,<sup>83</sup> the Fifth Circuit Court of Appeals set forth twelve factors for a court to consider in setting reasonable attorney fees.<sup>84</sup> The twelve factors are: (1) The time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill necessary to properly perform the legal services; (4) the degree to which other work of the attorney is precluded due to accepting the present case; (5) the attorney's 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; and (12) awards in similar cases.<sup>85</sup>

The lodestar and *Johnson* twelve-factor approaches became the basis for calculating attorney fee awards, and have been followed by every federal circuit.<sup>86</sup> Only the Fourth Circuit follows the *Johnson* twelve-factor approach exclusively.<sup>87</sup> The Second, Third, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted an approach which *blends* the lodestar and *Johnson* twelve-factor

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82. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. (Lindy II)*, 540 F.2d 102, 117-18 (3d Cir. 1976) (en banc). The court stated that under the rubric of contingent nature of recovery, a court should analyze the plaintiff's burden, the risks assumed in developing the case, and the delay in receipt of payment for services rendered. *Lindy II*, 540 F.2d at 117. Under the rubric of quality of attorney's services, a court should consider the result obtained, and the professional methods used in prosecuting the case. *Id.* at 117-18.

83. 488 F.2d 714 (5th Cir. 1974).

84. *Id.* at 717-19.

85. *Id.* The House and Senate Reports on the Civil Rights Attorney's Fees Awards Act of 1976 referred to these twelve factors. See *supra* notes 67-74 and accompanying text (discussing the Civil Rights Attorney's Fees Awards Act of 1976).

86. See ATTORNEY FEE AWARDS, *supra* note 5, § 2.05, at 35-39 (listing cases, by circuit, which have adopted one or both of these approaches).

87. *Id.* at 36-37.

approaches.<sup>88</sup> The District of Columbia, First, Sixth and Seventh Circuits follow either a pure or modified form of the lodestar approach.<sup>89</sup> With the Federal Circuit Courts of Appeals applying different approaches, the United States Supreme Court was faced with the need to endorse one or both approaches. The Court adopted the lodestar model, but recognized that the calculation of reasonable attorney fees should be enhanced to reflect *Johnson* factors not subsumed in the lodestar.<sup>90</sup>

### 3. Supreme Court Approves Lodestar Model

The United States Supreme Court approved the lodestar model in two cases.<sup>91</sup> In *Hensley v. Eckerhart*,<sup>92</sup> the Court attempted to reconcile the two strands of analysis.<sup>93</sup> The issue in *Hensley* was whether a plaintiff who only partially prevailed could recover attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976.<sup>94</sup> The lodestar is the most useful starting point for determining reasonable attorney fees, but the court may also consider other *Johnson* factors not subsumed within the lodestar.<sup>95</sup> The Court noted that the degree of success was important in determining reasonable attorney fees, as was the interrelated nature of the plaintiff's successful and unsuccessful claims.<sup>96</sup> In *Hensley*, inmates at a state hospital alleged *inter alia* that the treatment and

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88. *Id.* at 35-39; *see, e.g.*, *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988), *Moore v. James H. Matthews & Co.*, 683 F.2d 830 (9th Cir. 1982) (adopting a blended lodestar and twelve-factor approach); *Gomez v. Gates*, 804 F. Supp. 69, 72 (C.D. Cal. 1992) (noting that before *Hensley*, cases suggested that a reasonable attorney fee award was to be determined by reference to the *Johnson* factors); *id.* (explaining that the Ninth Circuit adopted them in *Kerr*).

89. ATTORNEY FEE AWARDS, *supra* note 5, § 2.05, at 35-38.

90. *See infra* notes 91-110 and accompanying text (explaining how the Court embraced the lodestar approach).

91. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984).

92. 461 U.S. 424 (1983).

93. *See Gomez v. Gates*, 804 F. Supp. 69, 72 (C.D. Cal. 1992) (interpreting the Court's analysis in *Hensley*).

94. *Hensley*, 461 U.S. at 426; *see supra* note 54 and accompanying text (discussing the Civil Rights Attorney's Fees Awards Act of 1976).

95. *Hensley*, 461 U.S. at 433, 434 n.9.

96. *Id.* at 440.

conditions at the hospital were unconstitutional.<sup>97</sup> The district court found constitutional violations, and determined that the plaintiffs were prevailing parties, even though they had not succeeded on every claim.<sup>98</sup> The district court awarded attorney fees to the partially prevailing plaintiffs, and the Eighth Circuit Court of Appeals affirmed.<sup>99</sup> The United States Supreme Court examined congressional intent, and held that the *results* of litigation were relevant to the determination of reasonable attorney fees.<sup>100</sup> The *Hensley* Court noted that the lodestar approach was designed to provide reasonable compensation to attorneys, which required enhancing the lodestar for the results obtained, one of the *Johnson* factors not subsumed in the lodestar calculation.<sup>101</sup>

In *Blum v. Stenson*,<sup>102</sup> the Supreme Court was faced with the issue whether the lodestar could be adjusted to correlate with prevailing market rates.<sup>103</sup> Certain *Johnson* factors were necessarily subsumed within the lodestar, while others were normally, but not necessarily subsumed.<sup>104</sup> The Court held that obtaining exceptional results in the litigation would justify enhancing the lodestar.<sup>105</sup> *Blum* was a class action seeking to enjoin the state from automatically terminating Medicaid benefits when a recipient became ineligible for another government assistance program.<sup>106</sup> The district court entered judgment for the class, and the Second Circuit Court of Appeals affirmed.<sup>107</sup> The

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97. *Id.* at 426-27.

98. *Id.* at 427-28. The district court held that a patient has a constitutional right to "minimally adequate treatment." *Id.* at 427.

99. *Id.* at 428-29.

100. *Id.* at 429-37.

101. *Id.*

102. 465 U.S. 886 (1984).

103. *Id.* at 889. A second issue present in the case was whether a nonprofit legal organization should be paid according to their actual costs, or according to prevailing market rates, which are typically higher. *Id.* This issue is not relevant to the present discussion.

104. *Id.* at 901 n.17. The "novelty and complexity of the issues" were necessarily subsumed within the lodestar; the "quality of representation and results obtained" were not necessarily subsumed within the lodestar. *Id.* The Court expressly chose not to address whether the contingent nature of recovery was subsumed. *Id.*

105. *Id.* at 901.

106. *Id.* at 889-90.

107. *Id.* at 890.

plaintiff class requested attorney fees, including a fifty percent enhancement to the lodestar.<sup>108</sup> The district court awarded the requested attorney fees to the plaintiff class, which the Second Circuit upheld.<sup>109</sup> The Supreme Court affirmed the use of enhancements to the lodestar if the prevailing attorney achieved exceptional results.<sup>110</sup>

#### *D. Enhancement Factors for Lodestar*

The lodestar approach was designed to fully compensate attorneys by calculating reasonable attorney fees.<sup>111</sup> From the inception of the lodestar approach, courts recognized that the basic lodestar figure often needed to be *enhanced* to achieve a reasonable fee.<sup>112</sup> Simply multiplying a reasonable hourly rate by a reasonable number of hours can result in a fee that is unreasonably low because the lodestar does not consider other factors.<sup>113</sup> In order to achieve *full* compensation, the lodestar needs to account for any delay in payment to the attorney, any exceptional results obtained by the attorney, and the contingent nature of success.<sup>114</sup> Courts have enhanced the lodestar figure to reflect these three factors.<sup>115</sup>

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108. *Id.* at 891.

109. *Id.*

110. *Id.* at 897. The Court noted that a number of factors are ordinarily included either in the number of hours expended, such as the novelty and complexity of the legal issues, or in the hourly rate, such as the quality of representation, and thus are not appropriate factors in determining whether the lodestar requires enhancement. *Id.* at 898-99.

111. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

112. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. (Lindy I)*, 487 F.2d 161, 168 (3d Cir. 1973). These enhancements are neither bonuses nor windfalls to the attorneys involved. *Blum*, 465 U.S. at 896 n.12, 897. *Contra Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 215 (S.D.N.Y. 1992) (noting that courts have found disfavor with lodestar multipliers, and favor awarding a percentage of the recovery, in both common fund and statutory fee shifting cases).

113. *Blum*, 465 U.S. at 897.

114. ATTORNEY FEE AWARDS, *supra* note 5, § 4.31, at 163.

115. See *infra* notes 116-170 and accompanying text (discussing the three enhancements to the lodestar calculation).

1. *Delay in Payment*

In civil rights litigation, an attorney frequently receives compensation several years after the attorney has performed legal services.<sup>116</sup> This delay in payment of attorney fees is primarily due to the lengthy litigation process.<sup>117</sup> When the judicial process delays payment of attorney fees, the attorney suffers at least three distinct losses.<sup>118</sup> First, the attorney loses spending power due to inflation, as prices have increased while the attorney was waiting to be paid.<sup>119</sup> Second, the attorney loses the ability to invest the attorney fees and receive interest.<sup>120</sup> Third, the attorney loses the interest the attorney paid on debts incurred in order to keep operating while the attorney waited for payment.<sup>121</sup> In an effort to ameliorate these losses, courts have developed three ways to enhance the lodestar to compensate attorneys for delayed payment.<sup>122</sup> Courts can either include interest on the payment of attorney fees,<sup>123</sup> adjust the fee for inflation,<sup>124</sup> or combine the two in an “opportunity cost factor.”<sup>125</sup>

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116. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 716 (1987).

117. See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 10.1, at 452 (1985) (noting that many courts have up to four to five year backlogs in their trial calendars).

118. ATTORNEY FEE AWARDS, *supra* note 5, § 4.35, at 166.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* § 4.35, at 167.

123. Congress provided for post-judgment interest on civil judgments. 28 U.S.C. § 1961 (1992).

124. See *Kouba v. Allstate Ins. Co.*, 32 Fed. R. Serv. 2d (Callaghan) 1330, 26 Fair Empl. Prac. Cas. (BNA) 1689, 27 Empl. Prac. Dec. (CCH) P32,256 (E.D. Cal. Sept. 24, 1981) (holding that a fee award should be adjusted via an inflation factor during a period of double digit inflation, rather than by providing interest), cited in ATTORNEY FEE AWARDS, *supra* note 5, § 4.35, at 167 n.203.

125. See *Johnson v. University College*, 706 F.2d 1205, 1211 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983) (explaining that court should consider interest and inflation in calculating attorney fees); *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 274 (6th Cir. 1983) (recognizing that an adjustment for delay in payment of attorney fees was appropriate); *Chapliwy v. Uniroyal Inc.*, 670 F.2d 760, 764 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983) (affirming use of adjustment for delay in payment of attorney fees); ATTORNEY FEE AWARDS, *supra* note 5, § 4.35, at 167 n.204 (citing cases); see also *Library of Congress v. Shaw*, 478 U.S. 310, 322 (1986) (noting that providing interest on damages was functionally equivalent to providing compensation for delay in payment); *Id.* (recognizing that, although the government is immune from providing interest or compensation for delay in payment, it is appropriate in non-government cases to adjust for the timing

In *Missouri v. Jenkins*,<sup>126</sup> the United States Supreme Court addressed the issue of whether an enhancement for delay in payment is permissible.<sup>127</sup> *Jenkins* involved a class of public school children suing the school district and State of Missouri to desegregate their schools.<sup>128</sup> The students prevailed, and their attorneys requested attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976.<sup>129</sup> The attorneys had represented the students in litigation lasting over five years.<sup>130</sup> The district court awarded almost \$4 million in attorney fees.<sup>131</sup> The district court accounted for the lengthy delay in the payment of attorney fees by increasing the principal attorney's rate, and by using current market rates, rather than historical rates, for the remaining attorneys.<sup>132</sup> The Eighth Circuit Court of Appeals affirmed the attorney fee award.<sup>133</sup>

The Supreme Court upheld the enhancement for a delay in payment of attorney fees.<sup>134</sup> The Court noted that attorney fee awards were meant to compensate lawyers at the relevant market rate.<sup>135</sup> Recognizing the "time value" of money,<sup>136</sup> the Court stated that compensation received years later was not equivalent to receiving compensation when the legal services were performed.<sup>137</sup> Therefore, the Court held that the lodestar could be enhanced for delay in payment in order to determine reasonable

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of payment); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 716, 731 (1987) (distinguishing two types of enhancements: an enhancement for the risk of nonpayment, and an enhancement for delay in payment).

126. 491 U.S. 274 (1989).

127. *Id.* at 281-82.

128. *Id.* at 276-77.

129. *Id.* at 276.

130. *Id.*

131. *Id.* at 277.

132. *Id.*

133. *Id.*

134. *Id.* at 289.

135. *Id.* at 283.

136. See RICHARD BREALEY & STEWART MYERS, *PRINCIPLES OF CORPORATE FINANCE* 11 (2d ed. 1984) (defining the time value of money concept as one dollar received one year from now is worth less than one dollar received today, since the dollar received today can be invested, making it worth more than one dollar one year from now).

137. *Jenkins*, 491 U.S. at 283.

attorney fees.<sup>138</sup> Increasing the lodestar for delay in payment, however, merely accounts for one of the three enhancement factors; the lodestar may also need to be enhanced for exceptional success and the contingent risk of nonpayment.<sup>139</sup>

## 2. *Exceptional Success*

In *Hensley v. Eckerhart*,<sup>140</sup> the United States Supreme Court addressed the second enhancement factor--exceptional success obtained by the attorney.<sup>141</sup> The Court held that computing the lodestar is only the first step in calculating reasonable attorney fees.<sup>142</sup> The Court determined that district courts may adjust the lodestar for certain considerations, such as the "results obtained."<sup>143</sup> In *Hensley*, the plaintiff prevailed on five of six civil rights claims.<sup>144</sup> The Court noted that determining the degree of success is especially important when the fee shifting statute limits recovery to "*prevailing parties*."<sup>145</sup> The Court interpreted the "prevailing party" language as not permitting courts to compensate attorneys for time spent on unsuccessful claims that are unrelated to successful claims.<sup>146</sup> The Court recognized that if these claims were unrelated, the plaintiff could only recover attorney fees for time reasonably expended on the successful claims.<sup>147</sup> The Court held that if the claims were related, the district court should focus on the *overall* success obtained in

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138. *Id.* at 284.

139. *See infra* notes 140-170 and accompanying text (discussing the two remaining enhancement factors: exceptional success and contingent nature of recovery).

140. 461 U.S. 424 (1983).

141. *Id.* at 430; *see supra* notes 92-101 and accompanying text (providing summary of *Hensley* case).

142. *Hensley*, 461 U.S. at 434.

143. *Id.* at 430 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

144. *Id.* at 427.

145. *Id.* at 434 (emphasis added); *see supra* note 4 and accompanying text (defining "prevailing party").

146. *Hensley*, 461 U.S. at 434.

147. *Id.* at 435. However, the Court noted that having unrelated civil rights claims may be the exception, instead of the rule. *Id.*

relation to the hours spent on the case.<sup>148</sup> Thus, the Court gave the district court discretion to weigh the degree of success in determining reasonable attorney fees.<sup>149</sup> The Court recognized that courts could enhance the basic lodestar figure to reflect exceptional success.<sup>150</sup> After enhancing the lodestar for exceptional results achieved by the attorney, and for any delay in payment, the court still needs to consider an enhancement for the contingent risk of nonpayment.<sup>151</sup>

### 3. Risk of Nonpayment

If compensation is contingent on prevailing, attorneys will necessarily charge a higher rate than if compensation is certain, in order to account for the risk of nonpayment.<sup>152</sup> The Federal Circuit Courts of Appeals recognized the contingent nature of recovery to be an acceptable basis for an enhancement to the lodestar.<sup>153</sup> In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*<sup>154</sup> a citizen group sought to compel the Commonwealth of Pennsylvania to comply with the Clean Air Act.<sup>155</sup> The Commonwealth of Pennsylvania agreed to implement a program for the inspection and maintenance of vehicle emissions in counties surrounding the cities of Philadelphia and

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148. *Id.*

149. *Id.* at 440.

150. *Id.* at 435. In *Blum v. Stenson*, the Court reaffirmed that exceptional results warranted an enhancement to the basic lodestar calculation in order to achieve a reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 897 (1984). The Court in *Blum* placed an additional requirement on the party seeking attorney fees, or "fee-applicant" to prove that the quality of service was disproportionately high in relation to the hourly rates charged by her attorney. *Id.* at 899.

151. See *infra* notes 152-170 and accompanying text (discussing the final enhancement factor for risk of nonpayment).

152. *Blum*, 465 U.S. at 903 (Brennan, J., concurring).

153. See, e.g., *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 611-14 (1st Cir. 1985); *Hall v. Borough of Roselle*, 747 F.2d 838, 842-44 (3d Cir. 1984); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660-62 (7th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392-93 (7th Cir. 1984); *LaDuke v. Nelson*, 762 F.2d 1318, 1332-33 (9th Cir. 1985); *Hall v. Bolger*, 768 F.2d 1148, 1150-51 (9th Cir. 1985); *Jones v. Central Soya Co.*, 748 F.2d 586, 591-93 (11th Cir. 1984) (recognizing that the court could enhance the lodestar for the contingent risk of nonrecovery).

154. 483 U.S. 711 (1987).

155. *Id.* at 714; see *supra* notes 58-59 and accompanying text (discussing the Clean Air Act).

Pittsburgh.<sup>156</sup> The district court awarded attorney fees to the citizens' attorneys, and doubled the lodestar to account for certain phases of the litigation which were particularly risky.<sup>157</sup> The Third Circuit Court of Appeals affirmed the enhancement to the attorney fee award.<sup>158</sup>

In reviewing *Delaware Valley II*, the United States Supreme Court did not resolve the issue of whether federal fee shifting statutes permit the lodestar to be enhanced to reflect the risk of nonpayment.<sup>159</sup> A plurality<sup>160</sup> of Justices determined that a contingency enhancement is permissible where the plaintiff would not have found an attorney without one.<sup>161</sup> The plurality limited the enhancement to one third of the lodestar to deter attorneys from bringing suits that were more likely to fail than succeed.<sup>162</sup> The sole concurring Justice<sup>163</sup> would allow a contingency enhancement only when the particular legal market compensates for contingency, and the particular fee-applicant would have had substantial difficulties in finding an attorney without one.<sup>164</sup> The dissent<sup>165</sup> would always allow a contingency enhancement.<sup>166</sup> Thus, due to the Supreme Court's failure to reach a consensus in *Delaware Valley II*, the Court did not entirely resolve the issue of

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156. *Delaware Valley II*, 483 U.S. at 714.

157. *Id.*

158. *Id.* at 715.

159. *Id.*

160. Justice White authored the principal opinion, and was joined by Chief Justice Rehnquist, and Justices Powell and Scalia. *Id.* at 713.

161. *Id.* at 731.

162. *Id.* at 730. A case with only a 50% chance of success would require a 100% enhancement to the lodestar to achieve the same expected return of a case with a certain fee. A case with a 75% chance of success would only require a 33% enhancement to the lodestar to achieve parity with a certain fee. The plurality was implicitly providing a disincentive to attorneys to take cases with less than a 75% chance of success. See *infra* notes 305-317 and accompanying text (explaining the financial underpinnings of contingency enhancements).

163. Justice O'Connor concurred in part and in the judgment. *Delaware Valley II*, 483 U.S. at 731.

164. *Id.* at 731-34.

165. Justice Blackmun authored the dissenting opinion, and was joined by Justices Brennan, Marshall and Stevens. *Id.* at 735.

166. *Id.* at 735-55.

whether a contingency enhancement to the lodestar figure is available under federal fee shifting statutes.<sup>167</sup>

Five years after *Delaware Valley II*, the United States Supreme Court revisited the unresolved issue of whether a contingency enhancement to the lodestar is available.<sup>168</sup> The Court, in *City of Burlington v. Dague*,<sup>169</sup> determined that the contingency enhancement to the lodestar is no longer available.<sup>170</sup>

## II. THE CASE

In *City of Burlington v. Dague*,<sup>171</sup> the United States Supreme Court granted certiorari to determine the availability of a contingency enhancement to the lodestar calculation of reasonable attorney fees.<sup>172</sup> A majority of the Court in *Dague* held that contingency enhancements are not permitted under either the Solid Waste Disposal Act or the Clean Water Act.<sup>173</sup> In reaching its decision, the Court expressly adopted the plurality opinion in

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167. The Justices who decided *Delaware Valley II*, and who are still on the Supreme Court, voted 3-3 in favor of restricting the enhancement for the contingent nature of recovery. Justices White, Rehnquist, and Scalia concluded that a contingency enhancement should not be available. Justices O'Connor, Blackmun, and Stevens concluded that a contingency enhancement should be available. *Delaware Valley II*, 483 U.S. at 723-34.

168. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2639 (1992). However, this was a different Court than the one which stalemated in *Delaware Valley II*, with three new justices to help decide the issue. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991, 276-81 (1992). The plurality opinion in *Delaware Valley II* had only lost one of its proponents to retirement; Justice Kennedy replaced Justice Powell, who retired on the last day of the October term, 1986, the same day that *Delaware Valley II* was decided. *Id.*; Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 399 (1987); *Delaware Valley II*, 483 U.S. at 711. The strong dissent had lost two of its staunch supporters; Justices Souter and Thomas replaced Justices Brennan and Marshall respectively. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991, 276-81 (1992).

169. 112 S. Ct. 2638 (1992).

170. See *infra* notes 171-244 and accompanying text (discussing the *Dague* decision).

171. 112 S. Ct. 2638 (1992).

172. *Id.* at 2640.

173. *Id.* at 2643-44; see 42 U.S.C. § 6901 (1988); 33 U.S.C. § 1311 (1988); *supra* notes 58-59 and accompanying text (discussing the Solid Waste Disposal Act and the Clean Water Act).

*Delaware Valley II*, and expressly rejected the dissent's approach.<sup>174</sup>

A. *The Factual History*

The City of Burlington, Vermont owned and operated a landfill since the early 1960's.<sup>175</sup> In part of the landfill, trash was beneath the water table.<sup>176</sup> Ernest Dague, Sr. owned property adjacent to the landfill.<sup>177</sup> The landfill was also bounded by a wetland and pond, which occasionally flooded and covered parts of the landfill with water.<sup>178</sup> Due to this occasional flooding, and the fact that trash in the landfill was buried beneath the water table, groundwater mixed with, and flowed through contaminated waste in the landfill.<sup>179</sup> The liquid that was formed by the mixture of water and garbage was called "leachate," which contained chemicals found on federal toxic and hazardous lists.<sup>180</sup> The leachate entered the groundwater and killed small fish as well as water flora and fauna.<sup>181</sup>

The State of Vermont began to scrutinize the landfill in the early 1980's.<sup>182</sup> The State and City entered into an agreement to close the landfill by July, 1984.<sup>183</sup> The City's non-compliance

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174. *Dague*, 112 S. Ct. at 2643-44; see *infra* note 232 and accompanying text (discussing the dissenting opinion in *Delaware Valley II*).

175. *Dague v. City of Burlington*, 935 F.2d 1343, 1347 (2d Cir. 1991), *rev'd*, *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992). The landfill covered an 11 acre, rectangular parcel north of the commercial-residential center of the City of Burlington. *Id.*

176. *Id.* On the northern edge of the landfill, which was the portion furthest away from the City of Burlington, trash was buried nine feet below the water table. *Id.*

177. *Id.* Plaintiffs, including Mr. Dague, owned property east and south of the landfill. *Id.*

178. *Id.* The wetland and pond were located to the west of the landfill. *Id.* The wetland comprised the flood plain of a nearby river. *Id.*

179. *Id.* The contaminants in the garbage had originated from local industries. *Id.*

180. *Id.* The leachate had percolated through solid waste in the landfill, much as coffee percolates through coffee grounds. *Id.*

181. *Id.* The leachate was free to enter the groundwater beneath the landfill, because the landfill was not lined with a waterproof or water-resistant layer. *Id.* The fact that the leachate killed a species of fish known as the "fathead minnow" showed that the leachate was dangerous to vertebrates. *Id.* This proved that the leachate was dangerous to humans, who are also vertebrates. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1452 (26th ed. 1985).

182. *Dague*, 935 F.2d at 1348.

183. *Id.*

with the agreement resulted in the State and City amending the terms of the agreement several times.<sup>184</sup> This series of amendments culminated in an agreement under which the City was to install a leachate collection system.<sup>185</sup> This final agreement also gave the City the option to either relocate the landfill, or begin operating a recycling facility, and delay closing the landfill by two years.<sup>186</sup>

After the City of Burlington again failed to comply with the terms of the amended agreement, Mr. Dague and other nearby landowners hired attorneys on a contingent fee basis to bring suit.<sup>187</sup> They sought to force the city to close the landfill.<sup>188</sup> The State of Vermont concurrently brought an action to enforce the amended agreement.<sup>189</sup>

Dague's complaint alleged that the landfill had harmed the environment *generally*, and damaged the surrounding property *specifically*, because the landfill generated methane gas, wind-blown debris and hazardous waste.<sup>190</sup> The State of Vermont continued to perform environmental assessments of the landfill,<sup>191</sup>

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184. *Id.*

185. *Id.*

186. *Id.* The first option required closing the landfill by January 1, 1988. *Id.* The second option, to begin operating a recycling or "resource recovery" facility, extended the date to close the landfill to January 1, 1990. *Id.*

187. *Dague*, 112 S. Ct. at 2640. The City failed to install either a leachate control or methane gas control system, and also failed to properly notify the State of which option the City had chosen. *Dague*, 935 F.2d at 1348. The City of Burlington's board of aldermen did adopt a resolution to pursue the second option, to operate a recycling facility, but the mayor vetoed the resolution. *Id.*

188. *Id.* Plaintiffs moved for a preliminary injunction, which would have required the City of Burlington to close the landfill. *Id.* The federal Magistrate recommended that the district court deny the injunction, but require the City to institute remedial measures. *Id.* The district court adopted the Magistrate's recommendation, and ordered the City to install both a leachate collection system and a methane gas ventilation system within sixty days. *Id.* It was only in response to this federal court order that the City complied, and installed the two systems. *Id.*

189. *Id.*

190. *Id.* at 1346. The complaint sought injunctive relief, civil penalties, compensatory and punitive damages, costs and attorney fees. *Id.* Mr. Dague also sought an enhancement to the lodestar to reflect the contingent nature of recovery. *Id.*

191. *Id.* at 1348.

concluding that the landfill must be closed by 1990 due to the environmental concerns the landfill presented.<sup>192</sup>

*B. The Procedural History*

The district court found that the City had operated the landfill in violation of prohibitions against open dumping, that the landfill may have presented an imminent and substantial danger to the public health or the environment, and that the landfill had discharged pollutants into United States waters.<sup>193</sup> The district court ruled that the City of Burlington violated the Solid Waste Disposal Act (SWDA) and the Clean Water Act (CWA), and ordered the city to close the landfill.<sup>194</sup> The court also determined that Mr. Dague was a substantially prevailing party,<sup>195</sup> and was therefore entitled to an award of attorney fees under the Acts.<sup>196</sup>

The district court used the lodestar method to determine reasonable attorney fees.<sup>197</sup> In calculating the lodestar, the court found that the attorneys' hourly rates and number of hours expended were reasonable.<sup>198</sup> The district court held that a contingency enhancement would be appropriate if competent counsel might refuse to represent environmental clients without an enhancement, thereby denying non-affluent, environmental plaintiffs effective access to the courts.<sup>199</sup>

The district court stated that Mr. Dague's risk of not prevailing in his environmental claims against the City was substantial.<sup>200</sup>

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192. *Id.* The State concluded that the landfill did not pose any *immediate* danger to either human health or to the environment, but that the landfill did pose *long-term* environmental concerns. *Id.*

193. *Id.* at 1346-49.

194. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2640 (1992); *see supra* notes 58-59 and accompanying text (discussing the SWDA and CWA).

195. *See supra* note 56 and accompanying text (discussing the requirement in many environmental protection statutes that a party prevail before the court awards them attorney fees).

196. *Dague*, 112 S. Ct. at 2640.

197. *Id.*

198. *Id.*

199. *Id.* (quoting *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987)).

200. *Id.*

The court also noted that without an enhancement, Dague would have faced substantial difficulty in obtaining counsel of reasonable skill and competence.<sup>201</sup> As a result, a twenty-five percent enhancement of the lodestar was deemed appropriate.<sup>202</sup> The Second Circuit Court of Appeals affirmed,<sup>203</sup> and the United States Supreme Court granted certiorari.<sup>204</sup>

### *C. The Majority Opinion*

The Supreme Court held that, under the SWDA and the CWA, the lodestar cannot be enhanced for the contingent nature of recovery.<sup>205</sup> The Court in *Dague* expressly restricted its decision to contingency enhancements under the SWDA and the CWA.<sup>206</sup> Nevertheless, the Court also noted in dicta that the language in the two statutes is similar to many other federal fee shifting statutes, and that the case law construing what is a reasonable fee applies uniformly to all of the federal fee shifting statutes.<sup>207</sup>

The majority reviewed the Supreme Court's plurality opinion in *Delaware Valley II*.<sup>208</sup> The majority noted that the SWDA and

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201. *Id.*

202. *Id.*

203. *Dague v. City of Burlington*, 935 F.2d 1343, 1359-60 (2d Cir.), *rev'd*, *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992). The Second Circuit Court of Appeals concluded that the availability of an enhancement to the lodestar figure for the contingent nature of recovery was an open question among the circuit courts of appeals. *Id.* The Second Circuit expressly disagreed with the position taken by some circuits that Justice O'Connor's concurring opinion in *Delaware Valley II* was controlling. *Id.*; see *infra* notes 232, 280-285 and accompanying text (discussing Justice O'Connor's concurring opinion in *Delaware Valley II*).

204. See *infra* notes 205-223 and accompanying text (discussing the majority opinion by the Supreme Court).

205. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643-44 (1992). *Dague* was a 6-3 opinion, with Justices O'Connor, Blackmun and Stevens continuing their strong dissents from *Delaware Valley II*. The three new members of the Court, Justices Kennedy, Souter and Thomas, lined up with Chief Justice Rehnquist, and Justices Scalia and White, who had formed the nexus of the plurality opinion in *Delaware Valley II*.

206. *Id.*

207. *Id.* at 2641; see *infra* notes 321-323 and accompanying text (exploring the ramifications of these two seemingly inapposite statements).

208. *Dague*, 112 S. Ct. at 2640 (reviewing *Delaware Valley II*, 483 U.S. 711 (1987)); see *supra* notes 154-167 and accompanying text (discussing the *Delaware Valley II* opinion).

CWA were similar to many other federal fee shifting statutes.<sup>209</sup> The SWDA and CWA provided for the non-prevailing party to pay the reasonable attorney fees of the prevailing party.<sup>210</sup> The majority noted that the lodestar approach has “become the guiding light of our fee-shifting jurisprudence,” and that there is a strong presumption that the lodestar represents reasonable attorney fees.<sup>211</sup>

The majority stated four reasons for not permitting a contingency enhancement to the lodestar. First, a contingency enhancement would duplicate factors already included in the lodestar calculation.<sup>212</sup> The lodestar already reflects the difficulty of proving the merits either through the higher number of hours the attorney expended in proving a difficult claim, or in the higher hourly rate of an attorney skilled enough to prosecute the difficult

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209. *Dague*, 112 S. Ct. at 2641.

210. *Id.*

211. *Id.* (citing *Delaware Valley I*, 478 U.S. 546, 565 (1986)).

212. *Id.* The majority defined the risk of loss in a particular case as the “product” of the legal and factual *merits* of the claim, and the attorney’s *difficulty* in establishing those merits at trial. *Id.* The majority stated that the lodestar should not reflect the *merits* of the claim, since some weakness in the merits would always exist, and thus the lodestar would always have to be enhanced. *Id.* The majority concluded that enhancing the lodestar to account for the relative merits of the case would provide the same incentive for attorneys to bring relatively *meritless* claims as it would to bring relatively *meritorious* claims. *Id.* at 2641-42. The majority provided an example: a meritless claim with an underlying merit (i.e. probability of success) of only 20%, and a meritorious claim with a merit of 80%. *Id.* at 2642. Without a contingency enhancement, an attorney paid on a contingency fee basis, would prefer to take the meritorious claim, since the attorney would be four times more likely to be paid. *Id.* The majority stated that with a contingency enhancement, this preference would disappear. *Id.* The enhancement for the 20% claim would be a multiplier of five (= 100/20) which would be quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. *Id.* Thus, if an attorney spent ten hours working on each case, and the appropriate billing rate was \$100, the attorney would hope to earn \$1,000. *Id.* Without a contingency enhancement, the attorney’s *expected* fee would be \$800 (= 80% x \$1,000) for the meritorious claim, and only \$200 (= 20% x \$1,000) for the meritless claim. *Id.*; see *infra* note 305 (explaining the “expected return” concept). With a contingency enhancement, the attorney’s *expected* fee would be \$1,000 for both the meritorious claim (= 80% x 1.25 x \$1,000) and the meritless claim (= 20% x 5 x \$1,000). *Dague*, 112 S. Ct. at 2642. The majority also stated that the *difficulty* of establishing the merits of a case should not be the basis for a contingency enhancement. *Id.* at 2641.

case.<sup>213</sup> Accounting for it again by enhancing the lodestar figure would be double-counting.<sup>214</sup>

Second, the majority held that a contingency enhancement is inappropriate because it compensates plaintiffs for the risk of losing the case.<sup>215</sup> Just as fee shifting statutes bar non-prevailing plaintiffs from recovering, the statutes should also bar the plaintiff from recovering for the *risk* of not prevailing.<sup>216</sup> Thus, the majority concluded that awarding a contingency enhancement pays for an attorney's time spent on other cases where the client did not prevail.<sup>217</sup>

Third, the majority was concerned that courts would only use the contingency enhancement to increase, but not to decrease the fee award.<sup>218</sup> The Supreme Court has generally favored the lodestar model over the contingent fee model.<sup>219</sup> The majority stated that to attach a contingent fee enhancement onto the lodestar calculation creates a hybrid scheme, to which courts would only resort to increase attorney fees.<sup>220</sup>

Fourth, the majority claimed that contingency enhancements make a court's determination of fees more complex and arbitrary.<sup>221</sup> Thus, the determination would be more unpredictable, leading to increased litigation.<sup>222</sup> For all of these reasons, the majority concluded that a contingency enhancement is not permitted under the SWDA and CWA.<sup>223</sup>

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213. *Dague*, 112 S. Ct. at 2641 (citing *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984)); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 5 (noting that major litigation and complex transactions usually require greater attention and preparation than matters of lesser consequence).

214. *Dague*, 112 S. Ct. at 2641 (citing *Delaware Valley II*, 483 U.S. 711, 726-27 (1987)).

215. *Dague*, 112 S. Ct. at 2643.

216. *Id.*

217. *Id.*

218. *Id.* The majority was concluding that contingency enhancements could only be used to increase the lodestar for above-average risk (e.g. 125% of the lodestar), but not to decrease the lodestar for below-average risk (e.g. 75% of the lodestar).

219. *Id.* at 2643.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 2643-44. The Court expressly adopted Justice White's opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, 483 U.S. 711, 715-27 (1987).  
*Id.*

D. *The Dissenting Opinion by Justice Blackmun*

Justice Blackmun, joined by Justice Stevens, dissented, arguing that the majority's decision would hurt those plaintiffs who could neither afford to pay their attorneys a certain fee nor attract competent counsel with a contingent fee, because it prevented attorneys from being fully compensated.<sup>224</sup> The dissent believed that an enhanced fee was appropriate in *Dague*, based on two basic, underlying principles.<sup>225</sup> First, a reasonable fee must be fully compensatory, and based on prevalent rates in the relevant market.<sup>226</sup> Second, a lawyer paid on a contingency basis will tend to charge a higher fee.<sup>227</sup>

Justice Blackmun explained that, by not permitting a reasonable enhanced fee, *Dague* will weaken enforcement of the statutes where Congress authorized fee shifting, most importantly, many of our civil rights and environmental statutes.<sup>228</sup> Fee shifting litigation will become less remunerative than other types of litigation, where attorneys can charge higher rates to account for the risk of nonpayment.<sup>229</sup> A majority of attorneys will not take the less rewarding fee shifting cases, and only under-employed and public interest lawyers will prosecute such cases.<sup>230</sup>

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224. *Id.* at 2645 (Blackmun, J., dissenting).

225. *Id.* at 2644 (Blackmun, J., dissenting).

226. *Id.*

227. *Id.* Professional standards have recognized this practice as reasonable. *Id.* If an attorney has the option to take two cases which would require the same amount of time, and the first client can afford to pay a certain fee while the second client can only offer a contingent fee, in order to make the attorney indifferent between the two cases, even if the contingent fee case has more merit, the compensation in the contingent fee case would have to be higher. *Id.* A contingency enhancement compensates the attorney for the risk the attorney has taken by prosecuting the contingent fee case. *Id.* Thus, the majority refused to draw the only plausible conclusion. *Id.* A statutory fee which is consistent with market practices must be reasonable by definition. *Id.* Since an attorney in the private market expects additional compensation for assuming the risk of nonpayment, a reasonable statutory fee should also include additional compensation for contingency. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 2644-45 (Blackmun, J., dissenting). Justice Blackmun noted that under-employed attorneys are arguably less competent, and that there is an insufficient number of public interest lawyers to prosecute the volume of fee shifting cases. *Id.*

The dissenters argued that the majority opinion deviated from both Supreme Court precedent and congressional intent.<sup>231</sup> In *Delaware Valley II*, five Justices concluded that reasonable attorney fees could include compensation above the basic hourly rate, yet the *Dague* court held otherwise.<sup>232</sup> Congress intended for courts to enhance the lodestar, yet the *Dague* Court interpreted congressional intent differently.<sup>233</sup>

Moreover, none of the Court's arguments against a contingency enhancement were persuasive, according to the dissent.<sup>234</sup> The dissent argued that the majority capitalized on two meanings of the word "contingency," when it stated that the Supreme Court has turned away from the contingent fee to the lodestar model: A contingency fee, which is a percentage of the damages award, versus an attorney's fee being contingent on prevailing.<sup>235</sup> The majority's concern about "burdensome satellite litigation"<sup>236</sup> was

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231. *Id.* at 2645 (Blackmun, J., dissenting).

232. *Id.* (citing *Delaware Valley II*, 483 U.S. 711 (1987)). Justices Blackmun, Brennan, Marshall and Stevens would always allow a contingency enhancement, unless the attorney and client have mitigated the risk of nonpayment through some other method. *Id.* Justice O'Connor would allow a contingency enhancement when the particular market compensates for contingency, and the particular fee-applicant can prove that the applicant would have had significant difficulties in finding counsel. *Id.* at 2646 (Blackmun, J., dissenting); *see, e.g., Artis v. United States Indus. and Int'l Ass'n of Machinists and Aerospace Workers*, 805 F. Supp. 609, 610 (N.D. Ill. 1992) (noting that conventional wisdom after *Delaware Valley II* was that Justice O'Connor's concurring opinion was controlling because it was the fifth vote necessary for the judgment); *Gomez v. Gates*, 804 F. Supp. 69, 73 (C.D. Cal. 1992) (noting that the Ninth Circuit concluded that Justice O'Connor's opinion in *Delaware Valley II* became the law, but that the Second Circuit disagreed).

233. *Dague*, 112 S. Ct. at 2645 (Blackmun, J., dissenting). In enacting fee shifting legislation, Congress knew how to prohibit enhancements if it had wanted. *Id.* at 2645 n.4 (Blackmun, J., dissenting). A number of bills which would have prohibited enhancements failed to get a majority vote in Congress. *Id.* Also, Congress expressly prohibited enhancements to the lodestar under certain statutes. *Id.*

234. *Id.* at 2646 (Blackmun, J., dissenting). For example, the majority's first argument was that a contingency enhancement would allow an attorney to recover fees for cases in which the client had lost, and thus the fee award would be excessive. *Id.* In response, the dissent explained that fee shifting provisions generally award attorney fees to prevailing parties, not directly to the attorneys. *Id.*

235. *Id.* The dissent explained that the prevailing party did not intend to give a portion of the damages award to the attorney, as is typical under a contingent fee arrangement (first meaning of "contingent"), but rather, that the lodestar should be enhanced to reflect the contingent risk of nonpayment (second meaning of "contingent"). *Id.* at 2646-47 (Blackmun, J., dissenting).

236. *Id.* at 2643. The majority was concerned that after the case had been decided on the merits, there would be a second trial on the issue of attorney fees. *Id.*

misguided, since courts would quickly settle on appropriate enhancement percentages for different types of litigation.<sup>237</sup> The majority was also concerned that any approach which treats cases as a class would not work, because there is no relevant market for cases seeking only equitable relief and because attorneys only respond to the riskiness of the particular case involved.<sup>238</sup> Yet under the unenhanced lodestar, the trial court already must find a relevant private market from which to select a reasonable fee, and the majority's objection also assumes that the only relevant incentive for attorneys is the risk of losing.<sup>239</sup>

*E. The Dissenting Opinion by Justice O'Connor*

Justice O'Connor dissented separately to explain that reasonable attorney fees must provide an incentive to a lawyer deciding whether or not to take the case.<sup>240</sup> Justice O'Connor explained that, unless a contingent client can promise an enhancement to the basic lodestar amount which is sufficient to justify the risk of nonpayment, the attorney will take another case with a certain fee, even if the other case has less merit.<sup>241</sup> Reiterating her position in *Delaware Valley II*, Justice O'Connor argued that the enhancement should be based on how the market compensates contingent fee cases as a *class*, rather than on the assessment of the risk involved in any *particular* case.<sup>242</sup> Justice O'Connor recognized that although courts making enhancement

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237. *Id.* at 2647 (Blackmun, J., dissenting); see *infra* notes 280-285 and accompanying text (explaining Justice O'Connor's approach). Moreover, the dissent believed that the argument that enhancement determinations would be burdensome missed the point, since the issue was whether they are required by fee shifting statutes. *Dague*, 112 S. Ct. at 2647 (Blackmun, J., dissenting).

238. *Dague*, 112 S. Ct. at 2647 (Blackmun, J., dissenting).

239. *Id.* Justice Blackmun explained that enhancements would address the incentive common to all lawyers to avoid claims where the plaintiff cannot guarantee compensation if the attorney does not prevail. *Id.* The dissenters noted that, without an enhancement, even the *least* meritorious claim with *guaranteed* compensation, will be preferable to the *most* meritorious fee shifting claim with compensation only if the attorney *prevails*. *Id.*; see *infra* notes 305-317 and accompanying text (discussing the financial justifications for a contingency enhancement to the lodestar figure).

240. *Dague*, 112 S. Ct. at 2648 (O'Connor, J., dissenting).

241. *Id.*

242. *Id.*

determinations for different types of cases would be performing economic calculations with less than perfect data, the Court had never shied away from performing such calculations merely because the task was difficult or the result was potentially inaccurate.<sup>243</sup> Moreover, Justice O'Connor argued that courts would overcome the initial hurdles inherent in her approach as the enhancement rates appropriate for different kinds of litigation would quickly become settled.<sup>244</sup>

### III. LEGAL RAMIFICATIONS

Of the three possible enhancements to the lodestar--for delay in payment, exceptional results, and the contingent nature of recovery--the United States Supreme Court in *City of Burlington v. Dague* removed the most powerful.<sup>245</sup> Before the Supreme Court eliminated contingency enhancements in *Dague*, environmental and

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243. *Id.* Justice O'Connor listed inverse condemnation and antitrust cases as examples of similar economic calculations with imperfect data. *Id.*

244. *Id.* The majority found two problems with Justice O'Connor's approach. *Id.* at 2642. First, Justice O'Connor's approach placed conflicting demands on a prevailing party, who would have to prove not only that they would have had difficulty finding an attorney without a contingency enhancement because of the riskiness of their case, but also that attorneys did not want to take their case because of the riskiness of the class of cases as a whole. *Id.* Second, Justice O'Connor's approach treated cases as a class in determining the appropriateness of a contingency enhancement, and for those contingent-fee claimants seeking equitable relief, there is no private, contingent-fee market to define fully compensatory attorney fees. *Id.* Moreover, enhancing a lodestar based on the riskiness of the class as a whole, would mean that only those cases with the class-average chance of success would have their attorneys compensated appropriately. *Id.* Those attorneys whose cases have an above-average chance of success would be overcompensated. *Id.* Of course, the majority failed to note that under their model, those attorneys whose cases have a below-average chance of success would be undercompensated.

245. ATTORNEY FEE AWARDS, *supra* note 5, § 1.10, at 17. The Court has indicated that only truly *extraordinary* results will provide the basis for an enhancement to the lodestar for the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *see supra* notes 140-151 and accompanying text (discussing the enhancement for exceptional results). The vast majority of attorneys will be unable to prove that the results obtained in their case were exceptional, and thus an enhancement to the lodestar for the results obtained will generally not be available. The Supreme Court has also held that an enhancement to the lodestar for a delay in payment of the attorney fees may be appropriate when necessary to compute reasonable attorney fees. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). However, some delay in litigation is typical, and an attorney would probably have to argue an *unreasonably long* delay in payment of attorney fees in order to have the lodestar enhanced for this factor. *See supra* note 117 and accompanying text (discussing how the litigation process may be protracted).

civil rights attorneys relied on contingency enhancements to equate attorney fees under fee shifting statutes with more certain fees.<sup>246</sup> The Supreme Court's pronouncement in *Dague* has already begun to have ripple effects among environmental and civil rights attorneys and cases.<sup>247</sup>

The reasoning in *Dague* is convoluted,<sup>248</sup> and conflicts with valid economic or financial theory, which recognizes that attorneys consider the inherent risk when deciding which case to prosecute.<sup>249</sup> Thus, the Court's decision will add confusion to fee shifting jurisprudence.<sup>250</sup> While the Supreme Court specifically held that contingency enhancements to the lodestar are unavailable under the SWDA and CWA,<sup>251</sup> the Court's reasoning would seem to apply to contingency enhancements under all fee shifting statutes.<sup>252</sup> In fact, lower courts have already begun to interpret the *Dague* decision broadly.<sup>253</sup> The resulting confusion in interpretation of fee shifting statutes, should serve as a catalyst for Congress to reassess and revamp fee shifting provisions, in order to provide more fully compensatory, and more certain attorney fees.<sup>254</sup>

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246. See *infra* notes 305-317 and accompanying text (discussing how contingency enhancements to the lodestar bring attorney fee awards in equipoise with cases with more certain fees).

247. See *infra* notes 330-343 and accompanying text (discussing the cases which have already begun to interpret *Dague* broadly).

248. See *infra* notes 258-289 and accompanying text (discussing the confused reasoning in *Dague*).

249. See *infra* notes 290-317 and accompanying text (discussing the economic and financial theoretical underpinnings of contingency enhancements to the lodestar).

250. See *infra* notes 318-329 and accompanying text (discussing how the *Dague* decision will lead to confusion in fee shifting jurisprudence).

251. *Dague*, 112 S. Ct. at 2643-44.

252. See *infra* notes 344-396 and accompanying text (discussing how to limit the *Dague* holding).

253. See *infra* notes 330-343 and accompanying text (discussing the subsequent interpretation of *Dague*).

254. See *infra* notes 397-413 and accompanying text (discussing the potential congressional response to *Dague*).

*A. Criticism of the Majority Holding in Dague*

The Supreme Court's reasoning in the *Dague* opinion is obfuscating.<sup>255</sup> Moreover, the logic of the *Dague* decision runs counter to established economic<sup>256</sup> and financial theories.<sup>257</sup>

*1. Faulty Reasoning of Dague*

There are at least five weaknesses in the *Dague* Court's analysis of why a contingency enhancement to the lodestar should not be available. First, the Court assumes that a contingency enhancement pays an attorney for unsuccessful cases.<sup>258</sup> Second, the Court finds that contingency enhancements encourage attorneys to bring evil, speculative litigation.<sup>259</sup> Third, the Court rationalizes how it has chosen the lodestar model over the contingent fee model.<sup>260</sup> Fourth, the Court asserts that allowing contingency enhancements leads to increased complexity and arbitrary fee award determinations.<sup>261</sup> Finally, the Court unfairly attacks Justice O'Connor's alternative approach as unworkable.<sup>262</sup>

The first example of the Court's faulty reasoning in *Dague* is the conclusion that awarding a contingency enhancement pays for an attorney's time spent on cases in which the client did not prevail.<sup>263</sup> Just as fee shifting statutes bar a plaintiff from

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255. See *infra* notes 258-289 and accompanying text (examining the inherent conflicts in the *Dague* decision).

256. See *infra* notes 290-304 and accompanying text (explaining how economic theory supports contingency enhancements).

257. See *infra* notes 305-317 and accompanying text (explaining how financial theory supports contingency enhancements).

258. See *infra* notes 263-269 and accompanying text (discussing how the Court comes to the startling conclusion that a contingency enhancement pays attorneys for cases in which they have lost).

259. See *infra* notes 270-274 and accompanying text (discussing the Court's bias against speculative litigation).

260. See *infra* notes 275-276 and accompanying text (discussing the Court's semantic games).

261. See *infra* notes 277-279 and accompanying text (discussing the Court's reasoning).

262. See *infra* notes 280-285 and accompanying text (discussing the Court's attempt to discredit Justice O'Connor's seemingly rational approach).

263. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643 (1992).

recovering attorney fees spent on unsuccessful claims,<sup>264</sup> plaintiffs should not be entitled to recover for the risk of loss.<sup>265</sup> The Court empirically noted that contingency-fee attorneys pool their risk, and successful cases pay for unsuccessful ones.<sup>266</sup> To award a contingency *enhancement* would, in effect, pay an attorney for time spent on unsuccessful cases.<sup>267</sup> This is a specious argument, which confuses the two meanings of the word “contingency.”<sup>268</sup> The enhancement merely increases the attorney’s basic hourly rate, used to calculate the lodestar, to equal what the attorney effectively would have charged on a contingency basis.<sup>269</sup>

The second flaw in logic in the *Dague* decision is the Court’s implicit assertion that there is no merit in attorneys bringing speculative litigation.<sup>270</sup> However, speculative litigation often advances unique legal theories or new causes of action.<sup>271</sup> In this respect, speculative litigation is the hallmark of the entrepreneurial spirit of the American Bar.<sup>272</sup> An attorney can lawfully file a pleading which argues for the “extension, modification, or reversal of existing law” and not be subject to civil sanctions.<sup>273</sup> Moreover, the unadorned lodestar model may actually deter

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264. See *supra* notes 92-101 and accompanying text (discussing the Court’s interpretation of congressional intent in *Hensley* to this effect).

265. *Dague*, 112 S. Ct. at 2643.

266. *Id.*

267. *Id.*

268. See *infra* notes 275-76 and accompanying text (discussing the semantic gyrations in the Court’s use of the word “contingency”).

269. For example, if an attorney’s basic hourly rate is \$100 per hour, and the attorney would ordinarily charge the *equivalent* of \$125 per hour for a contingency fee case with an 80% probability of winning (e.g. a contingency fee contract for 1/3 of a \$75,000 expected award for 200 hours of work:  $1/3 \times \$75,000 = \$25,000 \div 200 \text{ hours} = \$125$  effective contingent hourly rate), then a 25% enhancement to the attorney’s \$100 basic rate would merely equate the rate with the effective contingent rate the attorney would have charged in order to take the case. The proper analysis is to consider an attorney’s marginal rate of return or “opportunity cost,” which is what another client is willing to pay the attorney.

270. *Dague*, 112 S. Ct. at 2641.

271. *The English Rule*, *supra* note 3, at 57.

272. *Id.*

273. FED. R. CIV. PROC. 11.

attorneys from representing clients with *meritorious*, not speculative claims.<sup>274</sup>

The *Dague* Court's third mistake in reasoning is its bald assertion that the Court has favored the lodestar model over the contingent fee model.<sup>275</sup> The Court is again playing semantic games because fee-award practice is, by definition, "contingent." Attorneys operating under fee shifting statutes get paid, if at all, only when the court awards fees, after the attorneys have already obtained successful results.<sup>276</sup>

The fourth lapse in the Court's logic is the determination that contingency enhancements would make setting fees more complex and arbitrary, and therefore more unpredictable and more litigable.<sup>277</sup> Yet lawyers already object to the lodestar model, due to the difficulty in predicting and collecting fees.<sup>278</sup> Moreover, Justice O'Connor's alternative approach to awarding contingency enhancements would not be more complex, because courts would quickly set appropriate enhancement factors for different types of cases.<sup>279</sup> Furthermore, the lodestar model itself is arbitrary, since it relies on a district court judge's perception of what is a "reasonable" number of hours expended on the case, as well as what is a "reasonable" local rate.

Finally, the Court in *Dague* attacks Justice O'Connor's approach without warrant, as placing conflicting demands on prevailing parties.<sup>280</sup> The Court stated that under Justice O'Connor's approach, prevailing parties would first have to prove that *they* would have had difficulty finding an attorney without a contingency enhancement due to the riskiness of *their* case, and

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274. *New Fee Award Procedure*, *supra* note 5, at 870.

275. *Dague*, 112 S. Ct. at 2643.

276. *See* ATTORNEY FEE AWARDS, *supra* note 5, § 1.02, at 3.

277. *Dague*, 112 S. Ct. at 2643. However, even under the English Rule, viewed as an alternative to the lodestar, significant litigation over fee shifting is inevitable. *The English Rule*, *supra* note 3, at 58.

278. *New Fee Award Procedure*, *supra* note 5, at 870.

279. Once courts had settled on a 25% enhancement as being appropriate in civil rights cases, for example, this would actually tend to reduce litigation on attorney fees. *See infra* notes 280-85 and accompanying text (discussing Justice O'Connor's approach).

280. *Dague*, 112 S. Ct. at 2642.

second that attorneys did not want to take their case because of the riskiness of the class as a *whole*.<sup>281</sup> The Court's argument misses the mark. Justice O'Connor's approach first requires that the prevailing party prove that, without a contingency enhancement, the prevailing party would have faced substantial difficulties in finding counsel.<sup>282</sup> Ostensibly, this requirement would prevent an enhancement from becoming a windfall to a client who had no difficulty in locating competent counsel. The second step in Justice O'Connor's approach requires a court to provide a risk enhancement based on the market's need for risk compensation.<sup>283</sup> This requirement prevents widely divergent compensation for risk between federal circuits.<sup>284</sup> Thus, though these two steps in Justice O'Connor's approach have different goals in mind, they do not "collide" as Justice Scalia's questionable logic in the majority opinion in *Dague* would have us believe.<sup>285</sup>

Regardless of whether the lodestar model or contingency enhancements will lead to increased litigation,<sup>286</sup> it is apparent that the Supreme Court's decision in *Dague* has created more unresolved issues than the Court resolved. Unsettled law leads to increased litigation, which merely adds to the problem of our overburdened court system.<sup>287</sup> Adding complexity to the law may be worthwhile if a decision rests on sound legal and empirical footing. However, the Court's decision in *Dague* does not rest on

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281. *Id.*

282. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (Delaware Valley II), 483 U.S. 711, 733 (1987) (O'Connor, J., concurring in part and concurring in the judgment). However, Justice O'Connor was agreeing with the plurality, of which Justice Scalia (who wrote the majority opinion in *Dague*) was a member, that this should be a requirement. *Id.* at 731.

283. *Id.* at 733.

284. *Id.*

285. *Dague*, 112 S. Ct. at 2642.

286. *See supra* notes 277-79 and accompanying text (comparing the Court's observations with other commentators').

287. Michael Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 235 (1984) [hereinafter *From Here to Attorney's Fees*].

legal precedent, but rather conflicts with existing economic<sup>288</sup> and financial theories.<sup>289</sup>

## 2. *Dague Not Based on Sound Economic Theory*

There are two theories underlying a contingency enhancement to the lodestar: An economic theory and a financial theory. The economic theory suggests that attorneys choose the cases in which they will invest their time based on how the attorneys are compensated.<sup>290</sup> The financial theory states that a rational attorney will demand a higher return for the higher risk involved in contingent fee cases.<sup>291</sup> The Court's decision in *Dague* ignores both of these theories. Thus, although the Court *ignores* how an attorney selects cases, *Dague* will undoubtedly *affect* how an attorney selects cases by making fee shifting cases less remunerative, and therefore less attractive than other cases.<sup>292</sup>

The economic theory is based on the relationship between the demand for a good or service, and the supply of that good or service.<sup>293</sup> If clients can obtain the same level of representation<sup>294</sup> at \$100 per hour from one attorney and \$200 per hour from a second, equally qualified attorney, rational clients

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288. See *infra* notes 290-304 and accompanying text (discussing the economic underpinnings of contingency enhancements).

289. See *infra* notes 305-17 and accompanying text (discussing the financial underpinnings of contingency enhancements).

290. *Riverside v. Rivera*, 477 U.S. 561, 579-80 (1986); ATTORNEY FEE AWARDS, *supra* note 5, § 1.07, at 11.

291. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (1983) (Brennan, J., concurring) ("The difference [between contingent and non-contingent rates] reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate."); *infra* notes 305-17 and accompanying text (discussing the financial theory underlying contingency enhancements).

292. See *infra* notes 303-4, 315-17 and accompanying text (discussing how attorneys will modify their decision-making regarding which cases to take, based on the Court's decision in *Dague*).

293. See generally ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 3-9; EDGAR K. BROWNING & JACQUELENE M. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 15 (1983) [hereinafter MICROECONOMIC THEORY] (explaining basic economic principles).

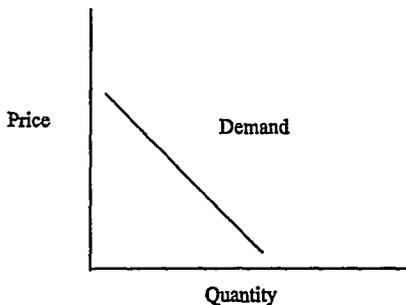
294. Economic analysis relies on having a fungible good or service. ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 3-9; MICROECONOMIC THEORY, *supra* note 293, at 85. Economic theory allows for variation in the quality of the good or service, here the quality of legal representation, by essentially separating the different types into different markets. *Id.*

will choose the attorney with the lower rate.<sup>295</sup> This inverse relationship, between the price of a service and the quantity of services desired, can be represented by an downward sloping demand curve, with clients demanding fewer services at higher rates.<sup>296</sup> Attorneys, as rational<sup>297</sup> suppliers of legal services, would also seek to maximize their wealth, and would be willing to supply more legal services at \$200 per hour than at \$100 per

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295. Economic theory relies on the basic principle that rational people seek to maximize their utility. See generally *ECONOMIC ANALYSIS*, *supra* note 3, § 1.1, at 3-9; *MICROECONOMIC THEORY*, *supra* note 293, at 52. Utility can be expressed in terms of happiness, or in terms of monetary wealth. *Id.*

296. Graphically, this would be represented as follows: Price is represented on the Y-axis, and quantity of services on the X-axis. The Demand curve is downward sloping, because as the *price decreases*, the *number* of litigants willing to pay that price for legal services *increases*.



See *ECONOMIC ANALYSIS*, *supra* note 3, § 1.1, at 4; *MICROECONOMIC THEORY*, *supra* note 293, at 9.

297. See *supra* note 295 and accompanying text (discussing how economic theory is based on the principle that rational people seek to maximize their wealth).

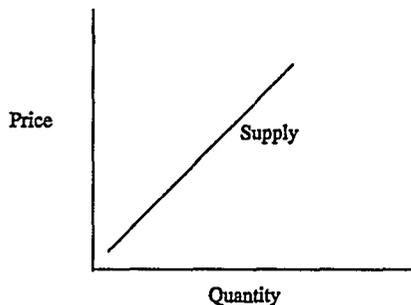
hour.<sup>298</sup> This can be represented by an upward sloping supply curve, with attorneys offering more services at higher rates.<sup>299</sup>

The contingent fee services supplied by attorneys are at equilibrium with those services demanded by litigants at the price

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298. See generally ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 3-9; MICROECONOMIC THEORY, *supra* note 293, at 12.

299. Graphically, this would be represented as follows: Price is represented on the Y-axis, and quantity of services on the X-axis. The Supply curve is upward sloping, because as the *price increases*, the *number* of attorneys willing to provide legal services at that price *increases*.



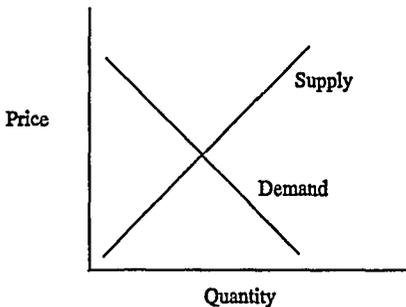
See ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 8; MICROECONOMIC THEORY, *supra* note 293, at 13.

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set in the competitive market.<sup>300</sup> The *demand* for legal services by plaintiffs would exceed the *supply* of those services if courts restrain attorney fees below the market rate.<sup>301</sup> The market for

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300. See generally ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 3-9. Graphically, this would be represented as follows: Price is represented on the Y-axis, and quantity of services on the X-axis. Where the demand for legal services equals the supply of legal services, the two curves *meet*, and the market is at *equilibrium*.



See ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 8; MICROECONOMIC THEORY, *supra* note 293, at 15; *Gomez v. Gates*, 804 F. Supp. 69, 76 (C.D. Cal. 1992) (explaining that the hourly rates lawyers charge in competitive markets are based on the market for legal services, legal specialty, character of law firm, and type of clients it serves).

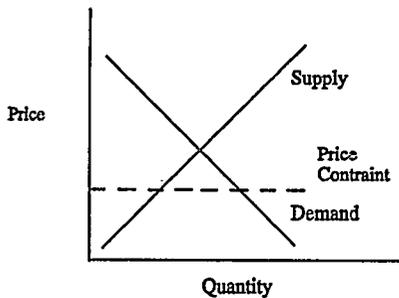
301. See generally ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 3-9; MICROECONOMIC THEORY, *supra* note 293, at 22 (explaining basic economic theory). The rate for contingent fee legal services is constrained *below* the market price if no contingency enhancement to the lodestar is possible.

contingent fee legal services would be out of equilibrium, and as a result, there would be more litigants seeking legal assistance than attorneys willing to help them.<sup>302</sup>

*Dague* has knocked the legal market for fee shifting services out of equilibrium. The contingency enhancement equated statutory attorney fee awards with attorney fees set in the private market for legal services.<sup>303</sup> By removing the possibility of a contingency enhancement, *Dague* has constrained attorney fees below the market rate. Attorneys are more likely to choose more remunerative cases than those under fee shifting statutes, which can only offer the unadorned lodestar calculation of attorney fees. There will be more litigants with fee shifting claims seeking legal assistance than attorneys willing to help these litigants. *Dague* has affected an attorney's decision-making process, not only by ignoring economic theory, but by ignoring financial theory as well.<sup>304</sup>

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302. Graphically, this would be represented as follows: Price is represented on the Y-axis, and quantity of services on the X-axis. The Price Constraint line intersects the Supply and Demand curves at different points. By paying less than the equilibrium price, more legal services are demanded than attorneys are willing to provide at that price. The market is out of equilibrium, and some litigants do not get legal services.



See ECONOMIC ANALYSIS, *supra* note 3, § 1.1, at 8; MICROECONOMIC THEORY, *supra* note 293, at 22.

303. See *supra* notes 268-69 and accompanying text (discussing how a contingency enhancement brought the lodestar figure more in line with attorney fees paid in the legal market).

304. See *infra* notes 305-17 and accompanying text (discussing the financial theory behind contingency enhancements).

### 3. Dague Not Based on Sound Financial Theory

Under the financial theory, attorneys who work on a contingent fee basis must charge a higher fee than those who are paid a certain fee in order to compensate for the risk of delay in payment and the risk of nonpayment.<sup>305</sup> Despite the majority opinion in *Dague*, this higher fee does not reward attorneys for cases in which they have not prevailed.<sup>306</sup> Under the contingent fee system, the client pays the attorney for sharing in the client's risk of loss, and the client and lawyer have common economic incentives to succeed with a minimum investment of time.<sup>307</sup> The risks of nonpayment and delayed payment are of the utmost economic importance to a contingent fee attorney, because they represent the attorney's "opportunity wage."<sup>308</sup> Fully compensatory attorney fees include enhancements for exceptional success, and the contingent risks of nonpayment and delay in payment.<sup>309</sup> In order to provide sufficient economic incentive for lawyers to supply their services

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305. See *supra* notes 116-39, 152-70 and accompanying text (discussing these two risks); ATTORNEY FEE AWARDS, *supra* note 5, § 1.08, at 12-13; Blum v. Stenson, 465 U.S. 886, 903 (1984) (Brennan, J., concurring) (noting that "[l]awyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid, irrespective of whether they win or lose."). If an attorney's hourly rate is \$100, and the attorney is faced with two claims both requiring ten hours of work: One with a certain fee, and the other with a contingent fee and an 80% chance of winning, the attorney would normally charge \$125 to the contingent client. This would equate the two "expected" benefits, which is the benefit multiplied by the probability that it will occur. ECONOMIC ANALYSIS, *supra* note 3, at § 1.2, p. 11. In this example, the expected return for both claims is \$1,000:

$$\$100/\text{hour} \times 10 \text{ hours} \times 100\% \text{ probability} = \$1,000$$

$$\$125/\text{hour} \times 10 \text{ hours} \times 80\% \text{ probability} = \$1,000;$$

Gomez v. Gates, 804 F. Supp. 69, 73 (C.D. Cal. 1992) (noting that the conventional wisdom is that lawyers who work on a contingency basis must earn an hourly rate equal to some multiple to that charged by lawyers paid in all cases). *But see id.*, at 74 (disagreeing with conventional wisdom because court had no experience with lawyers requiring higher rate in cases they win to be compensated for cases in which they lose).

306. ATTORNEY FEE AWARDS, *supra* note 5, § 1.08, at 13. Just as a businessperson would take into account the *cost* of goods sold but never paid for, so must an attorney account for that percentage of the attorney's time for which the attorney will not be paid.

307. ATTORNEY FEE AWARDS, *supra* note 5, § 1.08, at 13-14; see Kirchoff v. Flynn, 786 F.2d 320, 325 (7th Cir. 1986) (explaining that the contingent fee arrangement aligns the interests of the attorney and client, because the attorney gains only to the extent the client gains).

308. See ATTORNEY FEE AWARDS, *supra* note 5, § 1.10, at 17-18 n.82 (defining 'opportunity wage' as the compensation an attorney could obtain by representing clients paying a certain fee).

309. *Id.* § 1.10, at 19.

to civil rights litigants and other, courts must provide fully compensatory fees that account for inherent risks.<sup>310</sup>

Yet courts often ignore attorneys' concerns about risk when determining fully compensatory attorney fees. At most, courts seek to *equate* the expected return from a certain-fee case with the expected return from a contingent fee case, in an attempt to make the attorney indifferent between the two cases.<sup>311</sup> This approach *assumes* that attorneys are indifferent, or risk-neutral, between a certain-fee and a contingent fee with the same expected return.<sup>312</sup> Economists believe that most people avoid risk, and are thus risk-averse.<sup>313</sup> Risk-aversion reveals that what courts consider a fully compensatory fee may not be sufficient to attract counsel to prosecute contingent fee cases.<sup>314</sup>

*Dague* ignores the fact that attorneys are risk-averse, and seek higher attorney fees in more uncertain cases. By eliminating the contingency enhancement, the Court is, in effect, stating that attorneys who take fee shifting cases will be paid at less than the market rate. As a result, fewer attorneys will take fee shifting cases, because attorneys typically have other cases available, with more certain fees. This is what Justice Blackmun meant in his dissent when he said that only underemployed attorneys will continue to take fee shifting cases after *Dague*.<sup>315</sup>

*Dague* has affected how attorneys decide which cases to take. Attorneys will feel the pinch of *Dague* in lower attorney fees or increased competition for cases with more certain fees. However,

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310. *Id.*

311. See *supra* note 305 and accompanying text (explaining the "expected return" concept).

312. ECONOMIC ANALYSIS, *supra* note 3, § 1.2, at 11. In the previous example, a person who was risk neutral would be indifferent between taking the claim with a certain fee of \$1,000 and the claim with an 80% of a \$1,250 fee.

313. *Id.* § 1.2, at 11. In the previous example, a person who was risk averse would rather have the certain \$1,000 fee than take the 20% risk of receiving no fee. Risk aversion comes into play under the English Rule as well. If a client has a 90% chance of winning \$1,000, but a 10% chance of losing and having to pay the opponent's \$5,000 attorney fees, "a typical risk-averse, one-shot plaintiff [would be un]willing to risk \$5,000 to recover a \$1,000 loss, even at highly favorable odds." *The English Rule*, *supra* note 3, at 55, 57.

314. See ECONOMIC ANALYSIS, *supra* note 3, § 1.2, at 11 (explaining risk-aversion).

315. See *supra* notes 224-39 and accompanying text (discussing Justice Blackmun's dissent in *Dague*).

fee shifting plaintiffs will be the ones who will really feel the pinch of *Dague*, as they will be unable to attract competent counsel to take their cases.<sup>316</sup> *Dague* will unfortunately prevent meritorious actions from being pursued, and result in added confusion in fee shifting jurisprudence.<sup>317</sup>

### B. Resulting Confusion in Fee Shifting Jurisprudence

The United States Supreme Court provided little guidance to lower courts in *City of Burlington v. Dague*. The decision sends mixed signals, and will operate poorly in terms of precedential value. The *Dague* decision will serve as poor precedent for two reasons. First, the Court purported to limit its holding to the two fee shifting statutes involved, yet drafted a broad opinion with dicta to entice lower courts.<sup>318</sup> Second, the Court purported to adopt the plurality opinion in *Delaware Valley II*,<sup>319</sup> yet wrote an opinion at odds with that earlier opinion, leading to a curious result.<sup>320</sup>

The Supreme Court expressly limited its holding in *Dague* to the two statutes involved: The SWDA and the CWA.<sup>321</sup> Yet the Court provided dicta upon which lower courts could base a broad interpretation of *Dague*.<sup>322</sup> The Court noted that the language in these two statutes is similar to many other fee shifting statutes, and that the case law interpreting what is a reasonable fee applies uniformly to all of the fee shifting statutes.<sup>323</sup> Thus, the Court was providing a very limited holding, while also making a broad

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316. See *supra* notes 224-44 and accompanying text (discussing the dissenting opinions in *Dague*).

317. See *infra* notes 351-87 and accompanying text (discussing the four ways to limit the holding in *Dague*).

318. See *infra* notes 321-23 and accompanying text (discussing how the *Dague* decision sends mixed signals in terms of the breadth of the Court's holding).

319. 483 U.S. 711 (1987).

320. See *infra* notes 324-29 and accompanying text (discussing how reconciling the plurality opinion in *Delaware Valley II* with *Dague* leads to a curious result).

321. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643-44 (1992).

322. See *infra* notes 330-43 and accompanying text (discussing how *Dague* has been broadly interpreted by lower federal courts).

323. *Dague*, 112 S. Ct. at 2641.

pronouncement regarding the unavailability of contingency enhancements to the lodestar. Such mixed signals are a disservice to lower courts who must rely on Supreme Court decisions, because *Dague* can serve as precedent for a wide spectrum of views regarding the availability of contingency enhancements to the lodestar.

The second way in which the Court's logic in *Dague* is confusing, thereby providing little guidance to lower courts, is the Court's purported reliance on the plurality opinion in *Delaware Valley II*.<sup>324</sup> The Court expressly adopted Justice White's plurality opinion, and held that contingency enhancements were no longer possible under the two fee shifting statutes involved in the case.<sup>325</sup> Yet in *Delaware Valley II*, Justice White had determined that a contingency enhancement *is* permissible if the plaintiff would have been unable to find an attorney to prosecute the plaintiff's claim without the enhancement.<sup>326</sup>

Reconciling the Court's holding in *Dague* with its adoption of Justice White's opinion in *Delaware Valley II* leads to a curious result. Based on this language in *Dague*, one can only conclude that a contingency enhancement is prohibited, except where the plaintiff would not have been able to find counsel to take the plaintiff's case without a contingency enhancement.<sup>327</sup> This is confusing guidance for the Supreme Court to provide lower courts, because this reconciliation of the two cases appears to conflict directly with the Court's express holding in *Dague*. Thus, not only may courts limit *Dague* to the two environmental statutes at issue, the SWDA and the CWA,<sup>328</sup> but courts may also limit *Dague* to cases where the environmental plaintiffs would have been unable to attract competent counsel without a contingency enhancement.

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324. *Id.* (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (Delaware Valley II), 483 U.S. 711, 715-27 (1987)).

325. *Dague*, 112 S. Ct. at 2643-44.

326. *Delaware Valley II*, 483 U.S. at 731.

327. Perhaps the Court did not account for those cases where the plaintiff sues under the SWDA or CWA, and yet could not obtain counsel without a contingency enhancement. One commentator reads *Dague* in yet another way, as rejecting the award of attorney fees in excess of the fair market value of the attorney's services. *Settlement Incentives*, *supra* note 2, at 2168.

328. *See infra* note 351 and accompanying text (discussing how to limit *Dague* in this manner).

Besides serving as poor precedent, lower courts will have difficulty applying the Court's logic, which will result in varied interpretations of *Dague*.<sup>329</sup>

### C. Broad Interpretation of *Dague*

The *Dague* Court expressly limited its holding to eliminate contingency enhancements to the two environmental fee shifting statutes involved in the case.<sup>330</sup> However, the Court noted that the wording in these statutes was similar to the language in many other federal fee shifting statutes, and that the case law determining what constitutes a reasonable fee applies uniformly to all of them.<sup>331</sup> While it can be argued that the Court reached a narrow decision applying only to two statutes, in actuality, the Court established a broad principle to be applied in subsequent fee shifting litigation in lower courts.<sup>332</sup> A broad interpretation of *Dague* could destroy contingency enhancements under all fee shifting statutes, and in all circumstances. This would undoubtedly decrease the number of meritorious claims which impoverished civil rights and environmental plaintiffs will bring, and result in less competent counsel "substituting in" for the higher priced, and more competent attorneys who have been handling these types of cases.

Lower federal courts have already begun to interpret *Dague* broadly. Five of the Federal Circuit Courts of Appeals have had occasion to interpret *Dague*, and have uniformly interpreted the Supreme Court's decision as marking the demise of contingency enhancements to the lodestar under federal fee shifting statutes.<sup>333</sup>

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329. See *infra* notes 330-43 and accompanying text (discussing how lower courts have begun to interpret *Dague* broadly).

330. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643-44 (1992).

331. *Id.* at 2641.

332. *Id.* at 2641, 2643-44; see *infra* notes 333-43 and accompanying text (noting the broad interpretation given to the *Dague* decision).

333. *In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, Nos. 91-1635, 91-1946, 91-1636, 91-1971, 91-1641, 91-1972, 91-1645, 91-2159, 91-1646, 91-2160, 91-1647, 91-2258, 91-1648, 91-2259, 91-1649, 91-2360, 91-1650, 91-2261, 91-1651, 1992 U.S. App. LEXIS 32372, at \*46 (1st Cir. 1992) (concurring opinion); *Lipsett v. Blanco*, 975 F.2d 934, 943 (1st Cir. 1992); *Broyles v. Benefits Review Bd. of the U.S. Dep't of Labor*, 974 F.2d 508, 509 (4th Cir. 1992); *Drennan v. General Motors Corp.*, 1992 U.S. App. LEXIS 25613, at \*21-22 (6th Cir. 1992);

These courts of appeals have had little difficulty in extending *Dague* to other statutes, such as the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988.<sup>334</sup> The First Circuit appears willing to extend *Dague* even further, by possibly eliminating contingency enhancements in equitable fund cases.<sup>335</sup>

Similarly, the federal district courts have consistently interpreted *Dague* as removing the possibility of a contingency enhancement to the lodestar in statutory attorney fee awards.<sup>336</sup> The district courts have also extended *Dague* to other fee shifting statutes, including § 1988.<sup>337</sup> The district courts are in conflict whether to extend *Dague* to eliminate contingency enhancements in equitable fund cases.<sup>338</sup>

Thus, the lower federal courts have interpreted *Dague* both broadly and inconsistently with each other. Inconsistent

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*Wolfel v. Morris*, Nos. 91-3607, 91-3661, 91-4142, 1992 U.S. App. LEXIS 19043, at \*23 (6th Cir. 1992); *Smith v. Maywood*, Nos. 91-3004, 91-3169, 1992 U.S. App. LEXIS 18545, at \*10 (7th Cir. 1992); *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992); *Gates v. Deukmejian*, 977 F.2d 1300, 1311 (9th Cir. 1992).

334. *Lipsett*, 975 F.2d at 943; *Wolfel*, 1992 U.S. App. LEXIS at \*23-24; *Gates*, 977 F.2d at 1311; cf. *Smith*, 1992 U.S. App. LEXIS at \*10 (remanding the case, for the district court to decide whether *Dague* applies to cases brought under 42 U.S.C. § 1988).

335. See *In re Nineteen Appeals*, 1992 U.S. App. LEXIS at \*48-53 (1st Cir. 1992) (concurring opinion) (noting that *Dague*'s reasoning applies to risk multipliers in equitable fund cases, particularly when case is a hybrid between common fund and statutory fee shifting, and use of lodestar method provides a more reasonable attorney fee award).

336. *Artis v. U.S. Indus. and Int'l Ass'n of Machinists and Aerospace Workers*, 805 F. Supp. 609, 610 (N.D. Ill. 1992); *In re Bolar Pharmaceutical Co. (In re Bolar II)*, No. CV-89-1726, 1992 U.S. Dist. LEXIS 13261, at \*7-8 (E.D.N.Y. 1992); *Ermiler v. Town of Brookhaven*, No. CV 90-2781, 1992 U.S. Dist. LEXIS 11950, at \*87 (E.D.N.Y. 1992); *Finkelstein v. Bersna*, No. C 83-5125, 1992 U.S. Dist. LEXIS 15817, at \*72-73 (N.D. Cal. 1992); *Gomez v. Gates*, 804 F. Supp. 69, 74 (C.D. Cal. 1992); *Hernandez v. Morales*, No. 88-1578, 1992 U.S. Dist. LEXIS 19748, at \*5 (D.P.R. 1992); *Miner v. City of Glens Falls*, No. 89-CV-918, 1992 U.S. Dist. LEXIS 17370, at \*58 (N.D.N.Y. 1992); *Petramale v. Laborers' Int'l Union*, No. 81 Civ. 4817, 1992 U.S. Dist. LEXIS 12811 at \*19 (S.D.N.Y. 1992); *Snarr v. Sullivan*, No. 89-20360, 1992 U.S. Dist. LEXIS 19089, at \*10 (N.D. Cal. 1992); *Watkins v. Fordice*, 807 F. Supp. 406, 416 (S.D. Miss. 1992); *Weinberger v. Great Northern Nekoosa Corp.*, Nos. 89-0270, 89-0273, 89-0291, 1992 U.S. Dist. LEXIS 12073, at \*65 (D. Me. 1992); *Maloney v. Secretary of Dep't of Health and Human Services*, No. 90-1034V, 1992 U.S. Cl. Ct. LEXIS 324, at \*22 (Cl. Ct. 1992).

337. *Finkelstein*, 1992 U.S. Dist. LEXIS 15817, at \*72-73; *McDonald v. McCarthy*, No. 89-0319, 1992 U.S. Dist. LEXIS 9934, at \*5, (E.D. Pa. 1992); *Watkins*, 807 F. Supp. 406, 416 n.21.

338. Compare *In re Bolar II*, 1992 U.S. Dist. LEXIS 13261, at \*14, 17-18 (holding that *Dague*'s prohibition on contingency enhancements extends to common fund cases) with *Weinberger*, 1992 U.S. Dist. LEXIS 12073, at \*64 (holding that *Dague* does not apply in non-statutory fee shifting cases).

interpretations of *Dague* will only lead to uncertainty in the law, which, in turn, will promote litigation.<sup>339</sup> Potential litigants are more likely to sue when the case could go either way.<sup>340</sup> Moreover, uncertainty in the law causes society to lose faith in the judicial system.<sup>341</sup>

In addition, *Dague* has created different rules in federal and California state courts regarding the propriety of contingency enhancements to the lodestar or “touchstone” figure. Differing rules promote forum shopping, by providing an incentive to bring fee shifting claims in California state court where a contingency enhancement still exists. Different rules also lead to inequitable administration of the law. Defendants who would be liable in a California state court for enhanced attorney fees, could avoid entry of an enhanced attorney fee award by removing the case to federal court based on diversity of citizenship. Thus, defendants could impact their liability “solely because of the fortuity that there is diversity of citizenship between the litigants.”<sup>342</sup>

Moreover, the ability to limit *Dague* to environmental statutes, or to statutory fee shifting in general, or to those federal circuits with a pure lodestar approach will also lead to non-uniformity in fee shifting jurisprudence. These are just a few of the methods by which to circumvent the *Dague* decision.<sup>343</sup>

#### D. *Methods to Circumvent Dague*

In response to the Supreme Court’s decision in *Dague*, attorneys may simply raise their rates in order to recoup the

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339. *From Here to Attorney’s Fees*, *supra* note 287, at 235.

340. G. Robert Blakey, *Symposium Law and the Continuing Enterprise*, 65 NOTRE DAME L. REV. 1073, 1078 (1990).

341. *See Miller v. Arizona Bank*, 42 P.2d 518, 527 (1935) (stating that uncertainty in the law undermines public confidence in the judicial system).

342. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980).

343. *See infra* notes 344-96 and accompanying text (discussing possible ways to circumvent *Dague*).

necessary higher return to compensate for their risk.<sup>344</sup> Provided that a substantial number of attorneys raise their rates in a given market, this higher rate would become the local benchmark to use in lodestar calculations, and *Dague* will have been effectively circumvented.

It may be possible to limit *Dague* in four other distinct ways. First, the Court itself in *Dague* limited its holding to two environmental statutes.<sup>345</sup> Second, the *Dague* decision appears limited to statutory fee shifting, without affecting fee shifting under equitable doctrines.<sup>346</sup> Third, *Dague* may be limited to those jurisdictions which embrace the lodestar approach, without affecting to the same degree those jurisdictions that have combined the lodestar and *Johnson*<sup>347</sup> twelve factor approaches.<sup>348</sup> Finally, as a federal case interpreting federal law, *Dague*'s effect can be limited to federal claims.<sup>349</sup> In addition, enhancements to the lodestar for exceptional success and delay in payment are still available after the Court's decision in *Dague*.<sup>350</sup>

### *1. Dague Applicable Only in Environmental Arena*

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344. See *Gomez v. Gates*, 804 F. Supp. 69, 77 (C.D. Cal. 1992) (noting that if a higher, large firm rate were uniformly granted, this would easily attract competent counsel to even the most undesirable cases); *id.* (questioning if this is what the Supreme Court intended after its decision in *Dague*); *supra* notes 404-19 and accompanying text (discussing the financial theory of compensating for risk). *But see* *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992) (noting that *Dague*'s rejection of contingency as an enhancement to the lodestar similarly dictates that contingency not be a factor in setting billing rates); *Watkins v. Fordice*, 807 F. Supp. 406, 416-17 (S.D. Miss. 1992) (rejecting plaintiffs' contention that *Dague* does not apply to their case because they are not seeking an enhancement of the lodestar, but an enhancement of their hourly rates).

345. See *supra* notes 205-7, 321-23 and accompanying text (discussing how the *Dague* Court expressly limited its holding); *infra* notes 351-55 and accompanying text (explaining how the Court's language in *Dague* may be used to limit the decision).

346. See *infra* notes 356-64 and accompanying text (discussing how *Dague* should be limited to statutory fee shifting).

347. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); see *supra* notes 83-85 and accompanying text (discussing the *Johnson* case).

348. See *infra* notes 365-70 and accompanying text (discussing how *Dague*'s effect may be limited in those jurisdictions that do not exclusively follow the lodestar approach).

349. See *infra* notes 371-87 and accompanying text (discussing how *Dague* may be limited to federal claims).

350. See *infra* notes 388-96 and accompanying text (discussing how these two enhancements to the lodestar are still available).

The Court limited its express holding in *Dague* to the two environmental statutes involved, the SWDA and the CWA.<sup>351</sup> Even if the Court provided dicta in *Dague* from which courts can interpret the decision broadly, a sound argument can be made to limit *Dague* to environmental fee-shifting statutes. The language in environmental statutes differs from the language in the civil rights counterparts.<sup>352</sup> Environmental statutes typically give the court broad discretion to award attorney fees when “appropriate.”<sup>353</sup> In contrast, civil rights statutes only permit the court to award attorney fees to a “prevailing party.”<sup>354</sup> Moreover, the Hazardous Substance Superfund facilitates recovery under environmental statutes. There is no functional equivalent to the Superfund in civil rights legislation. Thus, there may be less risk of nonpayment in the environmental arena than in the civil rights arena, and therefore less need for a contingency enhancement.

For these reasons, an attorney may effectively argue that the *Dague* decision is limited to environmental statutes. As a result, all three enhancements, for delay in payment, exceptional results and contingent nature of recovery, would still be available under fee shifting statutes *outside* of the environmental arena. Even if a lower court believes that *Dague* is not limited to environmental fee shifting statutes, attorneys should be able to limit *Dague* to statutory fee shifting.<sup>355</sup>

## 2. *Dague* Applicable Only to Statutory Fee Shifting

*Dague* may also be limited to attorney fee awards under federal fee shifting statutes, as the case had nothing to do with fee shifting

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351. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2643-44 (1992).

352. *See supra* notes 50-60 and accompanying text (discussing civil rights and environmental fee shifting statutes).

353. *See supra* notes 56-59 and accompanying text (surveying environmental fee shifting statutes); *supra* note 58 (discussing *Ruckelshaus*, where the Supreme Court limited courts’ broad discretion to award attorney fees when “appropriate” to plaintiffs who, at least *partially*, prevailed).

354. *See supra* notes 53-55 and accompanying text (surveying civil rights fee shifting statutes).

355. *See infra* notes 356-64 and accompanying text (discussing how *Dague* should not apply to fee shifting under equitable doctrines).

under *equitable doctrines*.<sup>356</sup> There are other situations when awarding attorney fees is appropriate, most notably in the common fund area. A litigant, whose efforts have created a fund from which others obtain benefit, can require the beneficiaries to contribute to the costs of litigation, including attorney fees.<sup>357</sup> Common fund cases differ from cases brought under fee shifting statutes. Common fund cases are primarily shareholder derivative class actions,<sup>358</sup> whereas statutory fee shifting cases can be brought by a whole range of persons. Common fund cases also differ from statutory fee shifting cases in terms of their magnitude. Attorneys who bring class actions to recover a common fund award are essentially in "big business."<sup>359</sup> Attorneys who bring contingent fee cases under fee shifting statutes are essentially in "small business."<sup>360</sup> Moreover, common fund awards of attorney fees are based primarily on a fair percentage of the fund,<sup>361</sup> whereas statutory fee shifting awards of attorney fees are based primarily on time spent on the case.<sup>362</sup>

Due to the fundamental differences between equitable and statutory fee shifting, courts developed different guidelines for calculating attorney fees in the two areas.<sup>363</sup> The Supreme Court has not eliminated contingency enhancements under equitable doctrines. Thus, the arguments of the Court in *Dague* should not apply with equal force in an equitable fee shifting case. This permits class-action attorneys to effectively distinguish *Dague*. Attorneys in jurisdictions which do not strictly follow the lodestar approach may also be able to distinguish *Dague*.<sup>364</sup>

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356. See *supra* notes 40-42, *infra* notes 371-74 and accompanying text (discussing how attorney fees may be shifted under three equitable doctrines).

357. *Serrano v. Priest* (Serrano III), 20 Cal. 3d 25, 35, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 318 (1977) (citing *Quinn v. State*, 15 Cal. 3d 162, 167, 539 P.2d 761, 764, 124 Cal. Rptr. 1, 4 (1975)).

358. See ATTORNEY FEE AWARDS, *supra* note 5, § 1.04, at 6.

359. *Id.* § 1.08, at 14.

360. *Id.*

361. *Id.*, § 1.07, at 12.

362. *Id.*

363. See *id.* § 2.06, at 39-43.

364. See *infra* notes 365-70 and accompanying text (discussing how jurisdictions that follow a combination of the lodestar and *Johnson* twelve factor approaches may limit the *Dague* decision).

3. *Dague* Applicable Only in Lodestar Jurisdictions

Those federal circuits that have blended the lodestar and *Johnson* twelve-factor approaches may be able to limit *Dague*'s effect in a third way.<sup>365</sup> Attorneys can argue, not for an enhancement to the lodestar, but for higher attorney fees based on those *Johnson* factors not necessarily subsumed in the lodestar.<sup>366</sup> These factors may include: Opportunity cost of accepting a particular case;<sup>367</sup> time limits imposed by the client or the stage in the judicial process; and the undesirability of the client's case.<sup>368</sup> These factors are outside of the lodestar model, and were unaffected by the *Dague* decision.

*Dague* dealt exclusively with contingency enhancements to the lodestar, and circuits which have chosen to blend the lodestar and *Johnson* twelve-factor approaches should be receptive to increasing an award of attorney fees for other *Johnson* factors not subsumed in the lodestar.<sup>369</sup> Not only is *Dague*'s holding circumscribed in

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365. See *supra* note 88 and accompanying text (identifying those circuits, including the Ninth Circuit, which have blended the lodestar and *Johnson* approaches).

366. *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983); see *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1548-49 (9th Cir. 1992) (interpreting *Dague* as merely eliminating another *Johnson* factor, for the contingent nature of the fee); *Gomez v. Gates*, 804 F. Supp. 69, 75 (C.D. Cal. 1992) (perceiving *Dague* as neither holding that lodestar is always the beginning and end of calculating reasonable attorney fees, nor in expressly rejecting *Johnson* factors, but as merely adding contingency as another *Johnson* factor to list of factors necessarily subsumed within lodestar).

367. See *supra* note 308 and accompanying text (discussing how opportunity cost is a consideration under financial theory to support contingency enhancements).

368. ATTORNEY FEE AWARDS, *supra* note 5, § 4.36, at 173-74; see *Gomez v. Gates*, 804 F. Supp. 69, 76-77 n.9 (C.D. Cal. 1992) (noting that *Dague* did not eliminate the possibility of an enhancement to the lodestar to reflect the undesirability of a particular case, especially where the plaintiff is unlikely to prevail for reasons not having to do with the merits of the underlying claim, difficulty in establishing those merits, or the quality of the attorney's services, but rather, having to do with the unattractiveness of the plaintiff); *Hernandez v. Morales*, No. 88-1578, 1992 U.S. Dist. LEXIS 19748, at \*5 (D.P.R. 1992) (noting that after *Dague*, a court will still adjust the lodestar for factors other than contingency, such as complexity of legal issues involved, or grueling nature of services to be performed); *Snarr v. Sullivan*, No. 89-20360, 1992 U.S. Dist. LEXIS 19089, at \*8 (N.D. Cal. 1992) (considering whether any of the *Johnson-Kerr* factors applied in present case). *But see Davis*, 976 F.2d 1536, 1548-49 (noting that *Dague* can also be read as casting doubt on the relevance of a case's desirability to the calculation of reasonable attorney fees).

369. See, e.g., *Cunningham v. Los Angeles*, 879 F.2d 473, 484 (9th Cir. 1989) (noting that under a "hybrid approach," a court may adjust the lodestar for *Johnson* factors not included in the lodestar calculation).

several of the federal circuits, *Dague* may be limited to federal claims alone.<sup>370</sup>

#### 4. *Dague* Applicable Only in Federal Court

California fee shifting jurisprudence is independent from federal fee shifting jurisprudence. This realization is the basis for concluding that the Supreme Court's decision in *Dague* does not apply to California state claims in any court.

In determining whether to award attorney fees not covered by fee shifting statutes or prior agreement, California courts rely on three equitable principles:<sup>371</sup> (1) The "common fund" doctrine;<sup>372</sup> (2) the "substantial benefit" doctrine;<sup>373</sup> and (3) the "private attorney general" doctrine.<sup>374</sup> Although the United States Supreme Court rejected the private attorney general doctrine in actions based on federal law,<sup>375</sup> the California Supreme Court

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370. See *infra* notes 371-87 and accompanying text (discussing how *Dague* may not apply to California state claims brought in any court).

371. See generally Jineen T. Cuddy, Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds*, 24 PAC. L.J. 141 (1992) (providing background information on California fee shifting jurisprudence, and examining the procedural requirements involved in posting appeal bonds).

372. The common fund doctrine permits a litigant, whose efforts have created a fund from which others obtain benefit, to require the beneficiaries to contribute to the costs of litigation, including attorney's fees. *Serrano v. Priest* (Serrano III), 20 Cal. 3d 25, 35, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 318 (1977) (citing *Quinn v. State*, 15 Cal. 3d 162, 167, 539 P.2d 761, 764, 124 Cal. Rptr. 1, 4 (1975)).

373. The substantial benefit doctrine is similar, and permits a litigant, whose efforts have procured a judgment that confers a substantial benefit on members of an ascertainable class, to recover attorney fees. *Serrano III*, 20 Cal. 3d at 35, 141 Cal. Rptr. at 318.

374. The private attorney general doctrine encourages suits enforcing a strong public policy and benefiting a large class of people, by awarding attorney fees to plaintiffs who successfully sue persons infringing on important statutory and constitutional rights. *Woodland Hills Residents Ass'n. v. City Council*, 23 Cal. 3d 917, 933, 593 P.2d 200, 208, 154 Cal. Rptr. 503, 511 (1979); see CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1992) (codifying the private attorney general doctrine).

375. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); see *supra* note 54 and accompanying text (discussing the battle between the United States Supreme Court and Congress on the private attorney general doctrine). The private attorney general doctrine and the resulting "entrepreneurial litigation" are not without critics. See, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 216 (1983) (discussing how there are "perverse incentives" for the lawyer as entrepreneur).

adopted the private attorney general doctrine in *Serrano v. Priest* (*Serrano III*).<sup>376</sup>

In *Serrano III*, the California Supreme Court indicated that the “touchstone” for calculating reasonable attorney fees was a compilation of the time spent and a reasonable hourly compensation.<sup>377</sup> The California Supreme Court then provided a list of relevant factors to adjust this touchstone figure.<sup>378</sup> The “touchstone” in California fee shifting parlance is equivalent to the “lodestar” of federal fee shifting, and the *Serrano III* factors are comparable to the possible enhancements in federal court, as well as a few of the *Johnson* factors. A contingency enhancement is the third factor listed in *Serrano III*.<sup>379</sup>

*Serrano III* remains sound precedent in California.<sup>380</sup> California fee shifting jurisprudence is completely independent from federal fee shifting jurisprudence, with its own principles, statutes and precedents. The United States Supreme Court’s decision in *City of Burlington v. Dague*<sup>381</sup> is controlling in

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376. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). See generally 7 B. E. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 171 (1985 & Supp. 1992) (discussing the California Supreme Court’s decision in *Serrano III*). Shortly before the *Serrano III* decision was filed, the California Legislature enacted Code of Civil Procedure § 1021.5, which codified the private attorney general concept. See *Woodland Hills*, 23 Cal. 3d at 932, 593 P.2d at 208, 154 Cal. Rptr. 511 (discussing the differences between the private attorney general under *Serrano III* and under Code of Civil Procedure § 1021.5).

377. *Serrano III*, 20 Cal. 3d at 48-49, 569 P.2d at 1316, 141 Cal. Rptr. at 328.

378. *Id.* at 49, 569 P.2d at 1316-17, 141 Cal. Rptr. at 328. The California Supreme Court listed seven factors: “(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed; and (7) the fact that in the court’s view the two law firms involved had approximately an equal share in the success of the litigation.” *Id.*

379. *Id.* at 49, 569 P.2d at 1316-17, 141 Cal. Rptr. at 328.

380. See, e.g., *Levy v. Toyota Motor Sales U.S.A., Inc.*, 4 Cal. App. 4th 807, 5 Cal. Rptr. 2d 770 (1992); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1 Cal. Rptr. 2d 459 (1991); *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 667 P.2d 704, 193 Cal. Rptr. 900 (1983); *Serrano v. Unruh* (*Serrano IV*), 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982); *Folsom v. Butte County Assoc. of Gov’ts*, 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982) (following *Serrano III*).

381. 112 S. Ct. 2638 (1992).

federal statutory cases, whether they are brought in federal or state courts.<sup>382</sup> However, *Dague* is not controlling over California state law claims, whether they are brought in California state courts, or in federal courts based on diversity of citizenship.<sup>383</sup> Under the Rules of Decision Act, a federal court sitting in diversity jurisdiction over a California state law claim must apply California state law.<sup>384</sup> Thus, a contingency enhancement is still possible under California law.

A federal court with diversity jurisdiction over a California fee shifting case would be required to apply California state law. California state law continues to recognize the validity of a contingency enhancement to the lodestar or “touchstone” figure. Thus, the United States Supreme Court’s decision in *City of*

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382. See, e.g., 7 B. E. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 162 (1985 & Supp. 1992) (noting that California courts have concurrent jurisdiction with federal courts over civil rights actions under 42 U.S.C. § 1983, and may award attorney fees under 42 U.S.C. § 1988). This is a slight simplification, since a state court applying federal law must be cognizant of the “inverse-*Erie* doctrine.” JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE, § 4.8, at 232-34 (1985) (referring to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). The principal question under the inverse-*Erie* doctrine is how much leeway a state court has in following its own procedural rules. FRIEDENTHAL, *supra* § 4.8, at 233. The question in the present context is whether a California state court interpreting a federal fee shifting statute would feel compelled to follow the *Dague* decision. In an action brought in a California state court under the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51, the California Supreme Court permitted additur, even though the United States Supreme Court had held that additur was unavailable in federal court. *Jehl v. Southern Pac. Co.*, 66 Cal. 2d 821, 835, 427 P.2d 988, 997, 59 Cal. Rptr. 276, 285 (1967); see *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935) (holding that the use of additur in the federal courts violates the Seventh Amendment to the United States Constitution). Yet in *Dice v. Akron, Canton & Youngstown Railroad Co.*, the United States Supreme Court reversed the state practice of refusing to grant a jury trial, holding that trial by jury was too important a part of the substantive rights provided under FELA to be eliminated in a state action. *Dice*, 342 U.S. 359, 363 (1952). Arguably, permitting a contingency enhancement to the lodestar would be more akin to additur, and not nearly as important of a federal interest as the right to trial by jury. Thus, California state courts interpreting federal fee shifting provisions may be able to apply *Serrano III* rather than *Dague*, and permit enhancements to the lodestar.

383. 28 U.S.C. § 1332 confers jurisdiction to federal courts over the subject matter of disputes “between citizens of different states,” provided that the amount of damages sought is greater than \$50,000. 28 U.S.C. § 1332 (1988); see *supra* notes 380-82 and accompanying text (explaining how California’s fee shifting jurisprudence is independent of federal fee shifting jurisprudence, and thus *Dague* is not controlling).

384. See 28 U.S.C. § 1652 (1988) (stating that “[t]he laws of the several states . . . shall be regarded as rules of decisions in civil actions in courts of the United States, in cases where they apply.”). California law continues to recognize the validity of a contingency enhancement to the “touchstone” or lodestar figure.

*Burlington v. Dague*<sup>385</sup> is not controlling over a California State cause of action, whether it is brought in a California State or federal court.<sup>386</sup> Even in those courts where *Dague* is controlling, there are two remaining enhancements to the lodestar which are still available.<sup>387</sup>

### 5. Other Enhancements to Lodestar Still Available

After *Dague*, there remain other possible enhancements which may take the sting out of the Court's decision in *Dague*.<sup>388</sup> Since the Court in *Dague* did not address the availability of any other type of enhancement to the lodestar,<sup>389</sup> such enhancements are arguably still available after *Dague*. Under *Missouri v. Jenkins*,<sup>390</sup> enhancement is still possible for delay in payment.<sup>391</sup> Under *Blum v. Stenson*,<sup>392</sup> enhancement is still possible for exceptional

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385. 112 S. Ct. 2638 (1992).

386. This is not to say that *Dague* is unimportant to an attorney practicing law in California. First, no federal court has yet ruled on whether application of the decision in *Dague* is truly outcome determinative, and California state claims in federal court based on diversity jurisdiction may ultimately be subjected to *Dague*'s restrictions on contingency enhancements. Second, *Dague* is of course applicable to California attorneys who practice before the federal bench. Third, *Dague*'s constraints on contingency enhancements encourage California attorneys to factor this information into their decisions on whether to take the case, which claims to pursue, and which court in which to pursue them. Finally, the California Legislature or California Supreme Court could decide to follow the United States Supreme Court's analysis in *Dague*, and it would be helpful for California attorneys to anticipate this decision, perhaps in order to lobby against it.

387. See *infra* notes 388-96 and accompanying text (discussing the two remaining enhancements to the lodestar).

388. See *supra* notes 333, 336 and accompanying text (explaining how lower federal courts have interpreted *Dague* as eliminating contingency enhancements).

389. See generally *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) (focusing on the contingency enhancement to the lodestar).

390. 491 U.S. 274 (1989).

391. See, e.g., *Broyles v. Benefits Review Bd. of the United States Dept. of Labor*, 974 F.2d 508, 510 (4th Cir. 1992) (noting that although *Dague* prevented the court from awarding a contingency enhancement to the lodestar, the court could compensate for delay in payment by using current, rather than historical, hourly rates); *McDonald v. McCarthy*, No. 89-0319, 1992 U.S. Dist. LEXIS 9934, at \*5 (E.D. Pa. 1992) (holding that *Dague* does not preclude a lodestar enhancement for delay in recovery); *Petramale v. Laborers' Int'l Union*, No. 81 Civ. 4817, 1992 U.S. Dist. LEXIS 12811 at \*19 (S.D.N.Y. 1992) (interpreting *Dague* as holding that the only possible enhancement to lodestar in contingent fee cases is an adjustment for delay in payment); see *supra* notes 116-139 and accompanying text (discussing an enhancement for delay in payment).

392. 465 U.S. 886 (1984).

results.<sup>393</sup> The fact that other enhancements to the lodestar may still be available partially ameliorates the effect of *Dague* on a court's determination of reasonable compensation for attorneys. This is because enhancements are often considered concurrently in determining a multiplier to the lodestar,<sup>394</sup> and post-*Dague* courts may be more willing to use the remaining enhancements to better approximate the market value of the attorney's services.<sup>395</sup> Despite the ameliorative effect of these circumventions around *Dague*, the confusion in fee shifting jurisprudence, the unequal treatment of similar claims, and the deterrent effect of *Dague* on bringing meritorious claims, should convince legislative bodies to provide further guidance in the fee shifting arena.<sup>396</sup>

### *E. Need for Legislation in Fee Shifting Arena*

*City of Burlington v. Dague*<sup>397</sup> represents the Court's most recent gloss on the relatively straight-forward lodestar approach.<sup>398</sup> Although the lodestar method is not overly complex, it is the source of many problems and is widely criticized.<sup>399</sup> Attorneys who work on a contingency fee basis usually know how much the client owes and usually have little difficulty securing payment.<sup>400</sup> In contrast, attorneys who work for attorney fee

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393. See, e.g., *Weinberger v. Great Northern Nekoosa Corp.*, Nos. 89-0270, 89-0273, 89-0291, 1992 U.S. Dist. LEXIS 12073, at \*69-70 (D. Me. 1992) (holding that contingency enhancement is no longer available under *Dague*, but that multipliers are still available for the quality of representation, and results obtained); *Snarr v. Sullivan*, No. 89-20360, 1992 U.S. Dist. LEXIS 19089, at \*9 (N.D. Cal. 1992) (noting that multiplier for exceptional success is still possible if quality of service rendered was also superior); *Watkins v. Fordice*, 807 F. Supp. 406, 417 (S.D. Miss. 1992) (determining that enhancement for exceptional level of success survives *Dague*, but was inappropriate in the present case); see *supra* notes 140-51 and accompanying text (discussing an enhancement to the lodestar for exceptional results).

394. See ATTORNEY FEE AWARDS, *supra* note 5, § 4.39, at 175.

395. See *supra* note 303 and accompanying text (discussing how the enhancements to the lodestar approximate the market value of the attorney's services).

396. See *infra* notes 397-413 and accompanying text (discussing how Congress and the state legislatures should clarify fee shifting).

397. 112 S. Ct. 2638 (1992).

398. See *supra* notes 68-110 and accompanying text (discussing the development of the lodestar approach).

399. *New Fee Award Procedure*, *supra* note 5, at 867.

400. *Id.* at 870.

awards under fee shifting statutes, often have no way of knowing when or how much they ultimately will be paid.<sup>401</sup> A victory at trial offers no assurance of prompt payment, as the conclusion of the adversarial battle on the merits marks the beginning of a protracted struggle over attorney fees.<sup>402</sup>

It is clear that the lodestar system must be improved. The lodestar approach already wastes adjudicatory resources by often requiring a second litigation concerning attorney fees.<sup>403</sup> After the confusion caused by *Dague*, the lodestar approach will be even more wasteful. One commentator suggests that the time has come to reduce the dispensation of fees to a routine, bureaucratic process which delivers payments efficiently, predictably, in appropriate amounts, and with a minimum of litigation.<sup>404</sup>

The President's Council on Competitiveness<sup>405</sup> advocates adopting a modified English Rule,<sup>406</sup> with indemnification of the winner's attorney fees limited to the loser's own legal costs.<sup>407</sup> Yet it is generally accepted that the English Rule discourages privately funded parties from bringing meritorious claims.<sup>408</sup> The English Rule also includes provisions which mitigate the loser-pays principle for certain segments of the population.<sup>409</sup> These limits on the English Rule would need to be imported as well in order to avoid inequities in the rule's application.<sup>410</sup>

Now that the Supreme Court appears to have lost sight of the purposes behind federal fee shifting provisions, legislative bodies are in the most advantageous position to effect change in the

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401. *Id.*

402. *Id.*

403. *Id.* at 962.

404. *Id.* at 962.

405. The President's Council on Competitiveness was chaired by Vice President Dan Quayle. *The English Rule*, *supra* note 3, at 55.

406. See *supra* notes 28-31 and accompanying text (discussing the English Rule).

407. *Settlement Incentives*, *supra* note 2, at 2156. Application of the new rule would be limited to diversity cases in federal courts. *Id.*

408. *The English Rule*, *supra* note 3, at 55. Of course, the American Rule may encourage parties to bring meritless claims. See, e.g., John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 65 (1978) (noting that the American Rule decreases a will contestant's potential loss, which decreases the contestant's disincentive to litigate an improbable claim).

409. *The English Rule*, *supra* note 3, at 55-56.

410. *Id.*

lodestar process by enacting appropriate federal legislation.<sup>411</sup> Congress and the California Legislature<sup>412</sup> need to establish workable rules regarding the determination of reasonable attorney fees. For example, it would be advantageous for statutes to expressly define what factors courts must consider in determining a fully compensatory fee. These factors should include possible enhancements to the lodestar for the risks inherent in fee shifting cases. In addition, limits could be set on attorney fee awards, either in dollars or as a percentage of the damages award, in order to address the *Dague* Court's concerns.<sup>413</sup> It is clear that Congress and the California Legislature must react to the *Dague* decision, before the Supreme Court further erodes the incentive for attorneys to take fee shifting cases.

#### IV. CONCLUSION

Congress and the California State Legislature have enacted a plethora of fee shifting statutes.<sup>414</sup> Fee shifting statutes promote private enforcement of important laws, most notably civil rights and environmental protection provisions.<sup>415</sup> In interpreting these fee shifting statutes, courts developed the lodestar model as a

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411. See *supra* notes 305-17 and accompanying text (discussing how the Supreme Court's decision in *Dague* leads to a less than fully compensable award of attorney fees, which was one of the purposes behind the enactment of federal fee shifting statutes).

412. The California Legislature needs to react to the United States Supreme Court's decision in *Dague* because California state claims may ultimately be subjected to *Dague*'s restrictions on contingency enhancements for two reasons. First, the United States Supreme Court may hold that federal claims brought in California state court based on concurrent jurisdiction are subject to *Dague*'s analysis. Second, the California Supreme Court could decide to follow the United States Supreme Court's analysis in *Dague*. See *supra* note 386 and accompanying text (discussing the importance of the *Dague* decision to California attorneys).

413. See, e.g., CAL. GOV'T CODE § 800 (West Supp. 1992) (setting the rate at \$100 per hour and limiting the attorney fee award to \$7,500); CAL. CIV. PROC. CODE § 1031 (West Supp. 1992) (limiting the award of attorney fees to 20% of the damages award).

414. See *supra* notes 44-67 and accompanying text (discussing the efforts of Congress' and the California State Legislature).

415. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2644 (1992) (Blackmun, J., dissenting); see *supra* notes 44-49 and accompanying text (discussing the purposes behind fee shifting statutes); see *supra* notes 50-60 and accompanying text (surveying typical civil rights and environmental protection statutes).

means to compute reasonable attorney fees.<sup>416</sup> Courts recognized the inherent limitations of the lodestar model, however, and permitted enhancements to the lodestar to account for excluded factors.<sup>417</sup>

By eliminating the possibility of any enhancement to the lodestar for the contingent risk of nonrecovery,<sup>418</sup> the United States Supreme Court's holding in *City of Burlington v. Dague*<sup>419</sup> will deter claims brought under federal fee shifting provisions. *Dague* could also negatively affect claims brought under California fee shifting statutes, if either the California Legislature or the California Supreme Court decide to follow *Dague*'s confused analysis.<sup>420</sup>

There are a number of ways to circumvent the *Dague* decision.<sup>421</sup> However, regardless of any ability to limit *Dague*'s effect, *Dague* will have a negative impact on *some* plaintiffs' ability to find competent counsel for their federal claims, and may ultimately have an impact on similar claims under California state law. As dissenting Justice Blackmun noted, by preventing attorneys from receiving full compensation under these fee shifting provisions, *Dague* will harm more than the legal profession. *Dague* will prevent many plaintiffs from filing meritorious claims, because fee shifting plaintiffs will be unable to attract competent counsel to take their cases.<sup>422</sup> Less experienced and less capable attorneys will prosecute those claims which plaintiffs do file, thereby

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416. See *supra* notes 68-110 and accompanying text (discussing the evolution of the lodestar model).

417. See *supra* notes 111-170 and accompanying text (discussing the evolution of enhancements to the lodestar).

418. See *supra* notes 330-43 and accompanying text (discussing how the *Dague* decision effectively has eliminated the contingency enhancement).

419. 112 S. Ct. 2638 (1992).

420. See *supra* notes 255-317 and accompanying text (criticizing the majority opinion in *Dague*).

421. See *supra* notes 344-96 and accompanying text (discussing the various ways to circumvent *Dague*).

422. See *supra* notes 311-15 and accompanying text (discussing how risk-averse attorneys will turn away from fee shifting cases to cases with more certain fees).

weakening protection of important state and federal rights.<sup>423</sup> Fee shifting plaintiffs and attorneys no longer can wish upon the lodestar for reasonable attorney fees.

*James P. Benoit*

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<sup>423.</sup> *See supra* notes 224-39 and accompanying text (discussing Justice Blackmun's dissent in *Dague*).