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The Demise of Fee-Shifting Statutes: Will Congress Respond?

I. INTRODUCTION

In *City of Burlington v. Dague*,¹ the United States Supreme Court settled the debate of whether contingency enhancers² would be allowed under federal statutes with fee-shifting provisions.³ In a six to three decision, the Court unequivocally denied enhancement of attorney fees based on contingency beyond the lodestar⁴ amount under the federal statutes at issue.⁵ This holding responded to a split among the circuits that resulted from the four-one-four decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*.⁶

In *Dague* the United States Supreme Court reversed the decision of the court of appeals, which affirmed the district court's ruling, enhancing the lodestar amount by twenty-five percent.⁷ At trial, the district court found that the respondent retained his attorney on a contingency basis and would have faced substantial difficulty in retaining adequate counsel without the possibility of an enhancer; therefore, the district court awarded the enhancer.⁸ However, the Supreme Court refused to award such an enhancer.⁹ By holding that enhancement for contingency beyond the lodestar amount will not be allowed in federal statutes with fee-shifting provisions,¹⁰ the Court rejected five of the nine justices' opinions in

1. 112 S. Ct. 2638 (1992).

2. A contingency enhancer is a multiplier that is applied to an attorney's statutory fee to reflect that the attorney was retained on a contingency basis. See 112 S. Ct. at 2639.

3. *Id.* at 2643-44.

4. Lodestar is the product of reasonable amount of hours times a reasonable hourly rate. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546, 564 (1986).

5. 112 S. Ct. at 2634-44.

6. 483 U.S. 711 (1987) (*See infra* note 12 for a list of the different circuit views on this issue).

7. 112 S. Ct. at 2640.

8. *Id.*

9. *Id.* at 2643-44.

10. *Id.* Although this case only specifically applies to the SWDA and the CWA (*see infra* notes 13-14), the Court suggests that its holding will apply to other fee-shifting statutes, including 42 U.S.C. § 1988, which applies to Civil Rights cases. 112 S. Ct. at 2641.

Delaware Valley II.¹¹ The Court granted certiorari in *Dague* to respond to its failure to reach a majority in *Delaware Valley II*.¹²

This Article will analyze the Court's decision in *Dague* and articulate why this decision is contrary to established precedent and violates Congress' expressed intent when passing federal fee-shifting statutes.

II. THE FACTS OF *City of Burlington v. Dague*

The City of Burlington ("City") owned and operated a landfill adjoining Respondent Dague's property. Dague retained an attorney on a contingency-fee basis and sued the City for violating the Solid Waste Disposal Act ("SWDA")¹³ and the Clean Water Act ("CWA").¹⁴ After ruling in favor of Dague on the merits of the case, the District Court for the District of Vermont held that Dague was a "substantially prevailing" party entitled to "reasonable" attorney fees under the SWDA and CWA.¹⁵ Dague requested and the district court agreed that "reasonable" attorney fees included the lodestar amount plus a twenty-five percent enhancer to account for the fact that Dague retained his attorney on contingency and that he would not have been able to retain suitable counsel without the possibility of the enhancer.¹⁶ The court of appeals affirmed by agreeing

11. 483 U.S. at 731, 735 (O'Connor, J., concurring, Blackmun, J., Brennan, J., Marshall J., & Stevens, J., dissenting).

12. As a result of the Court's failure to reach a majority opinion in *Delaware Valley II*, the circuits have taken three different approaches to this issue: (1) Some completely bar enhancers, as the plurality in *Delaware Valley II* suggested (see *King v. Palmer*, 950 F.2d 771, 775 (D.C. Cir. 1991)); (2) Others affirm enhancers as the four dissenters in *Delaware Valley II* suggested (see *Craig v. Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989); *Fite v. First Tennessee Prod. Credit Ass'n*, 861 F.2d 884, 895 (6th Cir. 1988); *Skelton v. General Motors Corp.*, 860 F.2d 250, 257 (7th Cir. 1988); *Bernardi v. Yeutter*, 951 F.2d 971, 975 (9th Cir. 1991)); and (3) Still others limit enhancers to exceptional cases, as the concurrence in *Delaware Valley II* suggested (see *Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3rd Cir. 1988); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988).

13. 42 U.S.C. § 6972 (1983 & Supp. 1992) (see *infra* note 15 for specific statutory fee-shifting language).

14. 33 U.S.C. § 1365 (1988) (see *infra* note 15 for specific statutory fee-shifting language).

15. *Dague v. City of Burlington*, 732 F. Supp. 458, 472 (D. Vt. 1989). The SWDA and CWA provide that "[t]he court . . . may award costs of litigation (including reasonable attorney . . . fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e) (1983 & Supp. 1992); 33 U.S.C. § 1365(d) (1988).

16. 112 S. Ct. at 2640.

that "a 25% enhancement was appropriate to attract competent counsel without providing a windfall."¹⁷

III. THE DECISION

Justice Scalia wrote the opinion of the Court, with three justices dissenting. Justice Blackmun filed a dissenting opinion, in which Justice Stevens joined.¹⁸ Justice O'Connor filed a separate dissenting opinion.¹⁹

A. *The Majority Opinion*

The Court's analysis followed two major themes. First, the Court analyzed why a contingency enhancer had not worked in the past.²⁰ Second, the Court analyzed why a contingency enhancer is not feasible in the future.²¹

Why a Contingency Enhancer Had Not Worked in the Past. After briefly addressing the background on this particular issue,²² the Court followed precedents by stating that the lodestar is "'strong[ly] presum[ed]'" to represent a reasonable attorney fee.²³ The Court pronounced double payments, frivolous claims, and difficulty in administration as reasons for the failure of a contingency enhancer and, thus, for rejecting an enhancement beyond the lodestar.²⁴

The potential for double payment revolves around the elements of the contingency-fee payment system and the components of the lodestar.²⁵ Under the contingency-fee system, attorneys are compensated for their risk of loss.²⁶ The Court found two elements to be inherent in the risk of loss: "(1) The legal and factual merits of the claim, and (2) The difficulty in establishing those merits."²⁷ The Court believed that the second factor (the difficulty in establishing the merits of a claim) already existed in the lodestar.²⁸ The Court stated that this factor already appears in the fee awarded to the prevailing attorney via the increased number of hours a lawyer spends to overcome the difficulty or in the increased hourly rate

17. *Dague v. City of Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991).

18. 112 S. Ct. at 2644.

19. *Id.* at 2648.

20. *Id.* at 2641-42.

21. *Id.* at 2642-43.

22. *Id.* at 2640-41.

23. *Id.* at 2641 (quoting *Delaware Valley I*, 478 U.S. at 565).

24. *Id.* at 2641-42.

25. *Id.* at 2641.

26. *Id.* at 2640.

27. *Id.* at 2641.

28. *Id.*

an experienced attorney, in these matters, may demand.³⁰ Thus, to enhance the lodestar amount for contingency would create a windfall in the form of double payment to the prevailing attorney.³⁰

The Court also believed an enhancement based on contingency would encourage frivolous claims.³¹ The Court backed this proposition with a very simple analysis. If an attorney has a choice between two contingency fee cases, one with a twenty percent chance of success and the other with an eighty percent chance of success, absent any enhancer, the attorney will prefer the latter case, which is more meritorious as represented by its chance of success.³² However, if the claims are subject to an enhancer, the preference disappears.³³ There is no advantage for an attorney to choose the more meritorious claim because the risk posed by both cases is the same. Thus, since the risk of the meritorious and nonmeritorious claims is equal, the contingency enhancer "encourage[s] meritorious claims . . . but only at the . . . cost of . . . encouraging nonmeritorious claims [also]."³⁴

Finally, the Court reasoned that the underlying principles of a contingency enhancer were mutually exclusive.³⁵ Accordingly, there is no intelligible way that it can be administered.³⁶ The contingency enhancer, which the dissent approved of, is based on the fact that without it the plaintiff would encounter substantial difficulty in obtaining adequate counsel.³⁷ Thus, the greater the difficulty in obtaining adequate counsel, the greater the enhancer should be. Further, the Court stated that the primary reason a claimant cannot find adequate counsel is because its case is too risky.³⁸ Thus, the riskier the case the greater the enhancer should be. However, given the established precedent that a contingency enhancer shall not be based on the riskiness of a case,³⁹ the Court cannot create a

29. *Id.*

30. *Id.* Congress stated that fees should be adequate to attract competent counsel, but should not produce a windfall to the attorney. See S. REP. NO. 1011, 94th Cong., 2d. Sess. 6 (1976).

31. 112 S. Ct. at 2642.

32. *Id.*

33. *Id.* The case with a 20% chance of success is enhanced by 5 (100/20), thus giving it a 100% (20% x 5) adjusted chance of success factor. The case with an 80% chance of success is enhanced by 1.25 (100/80), thus giving it a 100% (80% x 1.25) adjusted chance of success factor. Since the adjusted chance of success factors are equal when the enhancer is applied, there is no incentive to choose the meritorious claim over the non-meritorious claim. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (citing *Delaware Valley II*, 483 U.S. at 733).

38. *Id.*

39. *Id.* (citing *Delaware Valley II*, 483 U.S. at 731).

larger enhancer, much less any enhancer, based on a factor that it has held to be contrary to enhancement in the first place.⁴⁰

Why a Contingency Enhancer is Not Feasible in the Future. First, the Court noted that the statutory language provides for attorneys of "prevailing plaintiffs" to recover their fees.⁴¹ When attorneys operate on a contingency basis, they pool their risk so that successful suits will cover their losses on unsuccessful suits.⁴² Therefore, to award a contingency enhancer would contradict the statutory language⁴³ by, in effect, awarding a plaintiff's attorney for time spent on unsuccessful cases at the expense of the defendants in the attorney's successful cases.⁴⁴

Second, the Court expressed concern that difficulties in administering when and under what circumstances contingency enhancers would be awarded posed another major obstacle to their use.⁴⁵ The Court believed that the administrability of the lodestar approach was far superior to the contingency enhancer technique.⁴⁶ For the contingency enhancer technique to work properly, it must mirror the private market. However, the intricacy and complexity of the private market would make the setting of an enhancer arbitrary and unpredictable and increase burdensome satellite litigation that the Court wanted to avoid.⁴⁷

For the foregoing reasons the Court ruled that the lodestar amount could never be enhanced for contingency.⁴⁸

B. Justice Blackmun's Dissent

Justice Blackmun, with whom Justice Stevens joined, expressed two principal reasons why an enhanced fee was "reasonable" within the meaning of the SWDA and the CWA and, thus, should not be banned.⁴⁹ Additionally, Justice Blackmun relied on congressional intent in enacting fee-shifting statutes as another reason for approving contingency en-

40. *Id.* at 2642-43.

41. *Id.* at 2643. SWDA and CWA award attorney fees to the "prevailing or substantially prevailing party." 42 U.S.C. § 6972(e) (1983 & Supp. 1992); 33 U.S.C. § 1365(d) (1988) (*see supra* note 15 for full text).

42. 112 S. Ct. at 2643.

43. *See supra* note 15.

44. 112 S. Ct. at 2643.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 2643-44.

49. *Id.* at 2644.

hancers.⁵⁰ Finally, Justice Blackmun addressed the defects of some of the Court's analysis.⁵¹

Justice Blackmun began with the established precedent of the Court that a reasonable fee is a "fully compensatory fee."⁵² Moreover, a reasonable fee must be calculated on the basis of the rates in the "relevant [private] markets."⁵³ Justice Blackmun relied on the fact that the private market compensates attorneys that are paid only when they prevail at a higher rate than those that are compensated win or lose.⁵⁴ Thus, Justice Blackmun concluded that when statutory fee-shifting was applicable to an attorney retained on a contingency basis, for that attorney to be fully compensated based on the relevant private markets, he must receive greater compensation than if he were to be compensated win or lose.⁵⁵ The lodestar compensates attorneys at a win or lose rate; thus, the contingency enhancer is needed to accomplish the full compensation requirement of a "reasonable" fee.⁵⁶

Justice Blackmun further argued that the Court's holding runs afoul of Congress' expressed intent in adopting fee-shifting provisions.⁵⁷ When adopting these statutory provisions, Congress' intent was to ensure the enforcement of federal laws by allowing private citizens to retain competent counsel not otherwise available because of the citizen's lack of financial resources and the fact that these types of cases (environmental and civil rights) typically involve small monetary damages, inadequate to induce plaintiff's counsel to take the case on the standard contingency arrangement.⁵⁸ If plaintiffs cannot assure their attorneys that they will be compensated for their risk of loss, only underemployed, less competent attorneys will accept this type of litigation.⁵⁹ Further, a number of bills that expressly prohibited contingency enhancers have failed to receive congressional approval.⁶⁰ In other situations Congress has approved bills

50. *Id.* at 2644-45.

51. *Id.* at 2646-47.

52. *Id.* at 2644 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

53. *Id.* (quoting *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 2644-45. In passing fee-shifting statutes, Congress intended to ensure that private citizens seeking to enforce selected federal statutes would be able to retain suitable counsel, thereby strengthening the enforcement of federal laws. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913.

58. 112 S. Ct. at 2644-45.

59. *Id.*

60. *Id.* at 2645 n.4 (citing *Delaware Valley II*, 483 U.S. at 739 n.3; see H.R. REP. NO. 5757, 98th Cong., 2d Sess., §§ 6(a)(1) and (2) (1984); H.R. REP. NO. 3181, 99th Cong., 1st Sess., §§ 6(a)(1) and (2) (1985); S. REP. NO. 1580, 99th Cong., 1st Sess., §§ 6(a)(1) and (2) (1985)).

that specifically prohibit contingency enhancers.⁶¹ The combination of Congress' failure to pass unusual bills that prohibit enhancers and the existence of special statutes that do in fact prohibit enhancers, shows Congress' belief that the standard fee-shifting statute, like the CWA and SWDA, do not prohibit enhancers.⁶²

Finally, Justice Blackmun refuted the Court's analysis of why a contingency enhancer would not be feasible in the future.⁶³ The Court's first major argument,⁶⁴ that contingency enhancer violates the statute by covering an attorney's costs for losing efforts, was flawed.⁶⁵ Justice Blackmun reminds the Court that it has recognized and carefully distinguished the fact that fee-shifting statutes authorize payment to prevailing parties, not prevailing attorneys.⁶⁶

The Court's other major argument,⁶⁷ that a contingency enhancer would be arbitrary and complex and thus lead to satellite litigation, also fails.⁶⁸ Justice Blackmun believed these matters would quickly become settled in each district, and further, whether something is burdensome has nothing to do with whether it is required by a statute.⁶⁹

C. Justice O'Connor's Dissent

Justice O'Connor stated that a "reasonable" fee must incorporate an incentive for the attorney contemplating whether to take the case.⁷⁰ This incentive must be adequate to attract competent counsel.⁷¹ If an attorney has a choice between two cases, one that will pay one hundred thousand dollars win or lose and one that will pay one hundred thousand dollars only upon winning, the attorney will always take the former, unless there is some enhancement (or incentive) to balance out the risk of nonpayment.⁷²

Justice O'Connor reiterated her Market Theory Approach⁷³ in which the contingency enhancer is "based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of

61. *Id.* (see 20 U.S.C.A. § 1415(e)(4)(c) (1990) ("[n]o [enhancer] may be used in calculating the fees awarded under this subsection")).

62. *Id.*

63. *Id.* at 2646-47.

64. See *supra* text accompanying notes 41-44.

65. 112 S. Ct. at 2646.

66. *Id.* (citing *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990)).

67. See *supra* text accompanying notes 45-47.

68. 112 S. Ct. at 2647.

69. *Id.*

70. *Id.* at 2648.

71. *Id.*

72. *Id.*

73. See 483 U.S. at 731 (O'Connor, J., concurring).

the "riskiness" of any particular case.'⁷⁴ Thus, under Justice O'Connor's Market Theory Approach, a contingency enhancer would not be based on the riskiness of any one case, which the Court has rejected,⁷⁵ but on the difference of fees paid in the private market between attorneys compensated whether they win or lose and attorneys compensated only when they win.⁷⁶

Finally, Justice O'Connor, like Justice Blackmun, pointed out the Court's flawed reasoning for failing to adopt her theory because of the nonexistence of a private market, when, in fact, the private market that Justice O'Connor relies on is the very same private market that the Court relies on to establish the lodestar.⁷⁷

IV. ANALYSIS

It has long been the "American Rule" that each party to a lawsuit shall bear the costs of its own attorney fees, unless Congress has expressly authorized the contrary.⁷⁸ Congress has authorized this fee-shifting in more than one hundred federal statutes. In these fee-shifting statutes, the courts not only resolve "who pays," but, also "when" and "how much" they will pay. As to the "when" and "how much" questions, Congress has not been exactly clear. In the majority, if not all, of these fee-shifting statutes, Congress has only stated that "reasonable" attorney fees "may" be awarded.⁷⁹ This is when the problem arises: When should a fee be awarded, what is a "reasonable" fee, and how is it determined? These questions have plagued the courts for quite some time. The Court was correct to address these issues and settle the dispute. However, the Court has let administrative convenience cloud its view of justice.

Before answering these questions, we must first look to congressional intent. When interpreting federal statutes, the courts have long recognized that they must interpret statutory language in a manner so as to best effectuate Congress' intent.⁸⁰ By enacting fee-shifting provisions in certain federal statutes, Congress intended to ensure the full enforcement

74. 112 S. Ct. at 2648 (citing *Delaware Valley II*, 483 U.S. at 731 (O'Connor, J., concurring)).

75. See *supra* note 39.

76. 112 S. Ct. at 2648.

77. *Id.*

78. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975).

79. See 42 U.S.C. § 6972(e) (1983 & Supp. 1992); 33 U.S.C. § 1365(d) (1988); 42 U.S.C. § 1988(b) (1988).

80. Samuel R. Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 306 (1977).

of these statutes by encouraging private citizens to enforce them.⁸¹ The citizens affected by these fee-shifting statutes are usually poor, and, therefore, they cannot afford to hire private counsel to enforce these federal statutes. The usual contingent fee model will not work to attract private counsel because these statutes do not involve large damage awards. Thus, the only way to attract adequate private counsel is to award "reasonable" attorney fees to a prevailing party.⁸² Congress' intent can only be accomplished by compensating attorneys at the full market rate for similar types of private litigation.⁸³

If attorneys are not compensated at the full market rate, only underemployed, less competent attorneys will accept these federal fee-shifting statute cases.⁸⁴ Competent, fully-employed attorneys (who may pick and choose their cases) can receive two or three times their hourly win or lose rate in the private contingency market; thus, they will not forgo that rate for a (smaller) win-only rate in the public contingency market when pursuing these public interests. Accordingly, Congress intended these fee-shifting statutes to fully compensate attorneys in order to attract competent counsel. The only way to accomplish this is by compensating attorneys in the contingency public markets at a rate equal to attorneys in the contingency private markets.

The Court failed to follow congressional intent in enacting fee-shifting statutes. However, the Court could have reached Congress' goal by simply following its own precedents. In *Blum v. Stenson*,⁸⁵ the Court held that it was within the expressed powers of the district courts to exercise discretion when determining whether an awarded fee is "reasonable."⁸⁶ It is also strongly presumed that the lodestar is a reasonable fee.⁸⁷ However, in *Hensley v. Eckerhart*,⁸⁸ the Court held that the lodestar is the starting point in determining reasonableness and not the finishing point.⁸⁹ But

81. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968) ("Congress therefore enacted the provision[s] for counsel fees . . . to encourage individuals injured . . . to seek judicial relief.")

82. H.R. REP. No. 1558, 94th Cong., 2d Sess. (1976).

Because a vast majority of the victims of [federal fee-shifting statutes] cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

Id.

83. 112 S. Ct. at 2644 (Blackmun, J., dissenting).

84. *Id.* at 2644-45.

85. 465 U.S. 886 (1984).

86. *Id.* at 902 n.19.

87. *Delaware Valley I*, 478 U.S. at 565

88. 461 U.S. 424 (1983).

89. *Id.* at 433-34.

what factors should the district courts look to when determining whether to exercise their discretion and overcome this presumption of reasonableness, thereby enhancing the lodestar?

The answer to this question is made up of two underlying and intertwining questions: (1) "When" should an enhanced fee be awarded, and (2) If awarded, by "how much" should the fee be enhanced? Congress has partially answered the "when" question.⁹⁰ However, by using the words "may award" in fee-shifting statutes, Congress has left the final answer up to the discretion of the courts.⁹¹ Further, Congress has provided almost no guidance into the realm of the "how much" question. Congress has only answered the "how much" question by saying a "reasonable" fee may be awarded.⁹² Since Congress has failed to provide sufficient guidance to answer these questions, the courts must look to precedents for the solution.

By looking closely at the Court's previous decisions, the district courts should rely on three factors to determine the reasonableness of an enhanced fee. These factors are the following: (1) All the facts and circumstances surrounding the claim;⁹³ (2) Do the relevant private market rates reflect a premium for contingency;⁹⁴ and (3) Would the plaintiff have substantial difficulty securing adequate counsel without the prospect of such enhancement.⁹⁵ Questions one and two primarily apply to the "how much" question, and the answers are strictly within the discretion of the district courts. However, before we get to the "how much" question, we must answer the "when" question. The Supreme Court, under the guise of administrative convenience, has answered this question by saying never,⁹⁶ thereby making the "how much" question moot. However, by looking at past cases we see that the "when" question is actually the same as question three above. Thus, contingency enhancers should be applied "when" the plaintiff would have had substantial difficulty obtaining counsel without the possibility of enhancement. Even though the application of the "substantial difficulty" test may be difficult and somewhat circu-

90. Certain federal statutes provide for defendants to pay for plaintiff's attorney fees. See *supra* notes 12-13.

91. See *supra* note 15.

92. See *supra* note 15.

93. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989).

94. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

95. 483 U.S. at 728 (plurality, part V stating that enhancements for contingency should be reserved for "exceptional cases"); *Id.* at 732-33 (O'Connor, J., concurring) (expressly joining part V of the plurality by stating enhancements for contingency should be limited to "severe difficulties").

96. 112 S. Ct. at 2643-44.

lar,⁹⁷ that is no reason to bypass both congressional intent and precedent, thereby abolishing contingency enhancers.

V. CONCLUSION

In *City of Burlington v. Dague*,⁹⁸ the Court addressed the long awaited and controversial issue of what is a "reasonable" attorney fee in federal fee-shifting statutes.⁹⁹ However, under the pretense of administrative convenience, the Court has not only controverted Congress' intent in enacting fee-shifting statutes but also overruled the substance of its prior decisions on the issue. It is clear that the lodestar should be enhanced for contingency in certain situations. Further, it seems that until Congress provides a more workable definition of "reasonable" fees, the Court should not throw up its hands in disgust and outlaw contingency enhancers completely. The Court should continue to follow Congress' intent and its own precedents even if it may lead to administrative problems. For the courts to determine what a reasonable attorney fee is, Congress must provide more direction. Until this happens the question of "reasonableness" should be left up to the discretion of the district courts.

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97. For a detailed explanation of these problems, see *King v. Palmer*, 950 F.2d 771, 776-85 (D.C. Cir. 1991) (majority opinion, parts B and C).

98. 112 S. Ct. 2638 (1992).

99. *Id.* at 2639.

