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# Contingency Enhancements in Attorney Fee Cases: *City of Burlington v. Dague*, the End of the Merit Systems Protection Board's Struggle to Understand and Apply *Delaware Valley II*

Cameron P. Quinn\*

Katharine A. Klos\*\*

The Supreme Court's recent decision in *City of Burlington v. Dague*,<sup>1</sup> by disallowing all enhancements to the lodestar fee awarded under federal fee-shifting statutes, simplified immeasurably the administration of federal fee-shifting attorney fee awards involving contingency fee agreements. Before some rush to overturn *Dague* legislatively and again award enhancement for cases taken on contingency involving federal fee-shifting statutes, they should review courts' experiences with the market approach, the means used to award contingency enhancements immediately prior to *Dague*, before designating the market approach as the model. Other alternatives may prove easier to administer and a better use of scarce judicial resources.

This article, in addition to examining the breadth of the holding of *Dague* (Section V), will explain prior Supreme Court guidance (Section II), highlight circuit court case law prior to *Dague* (Section III), and highlight the experience of the Merit Systems Protection Board (the Board) (Section IV), a federal agency with nationwide jurisdiction over the federal civil service, which attempted to interpret and apply the market approach test outlined in the most recent prior Supreme Court pronouncement on contingency enhancements, *Pennsylvania v. Delaware Valley Citizens Council for Clean Air (Delaware Valley II)*.<sup>2</sup> This article concludes that the market approach to awarding contin-

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

2. 483 U.S. 711 (1987) (plurality opinion) [hereinafter *Delaware Valley II*].

agency enhancements taken in Justice O'Connor's concurring opinion in *Delaware Valley II* was virtually impossible to square with earlier Supreme Court guidance, and that the approach of *Dague* is practical and principled. It recognizes, however, that some may wish to overturn *Dague* on policy grounds, and so cautions that the market approach is not the best alternative to achieve such a policy reversal (Section VI).

## I. INTRODUCTION

Prior to *Dague*, the fee award in contingency fee cases could be enhanced, or increased, under federal fee-shifting statutes, which obligate the government to pay the prevailing party's reasonable attorney fees. Contingency agreements most commonly provide that a client will pay counsel's fee only if the case is won, and that the payment will be a percentage of the client's monetary recovery.<sup>3</sup> In cases involving federal fee-shifting statutes, however, the government pays the fee to a prevailing attorney not based on a percentage of recovery, but on the "lodestar," which is the amount derived by multiplying the lawyer's customary hourly billing rate by the number of hours devoted to the case.<sup>4</sup> Beginning in 1984 when the Supreme Court adopted the lodestar model in *Blum v. Stenson*,<sup>5</sup> this method of fee calculation became standard federal government practice. The lodestar is awarded regardless of whether the attorney and client had entered into an hourly agreement, a contingency agreement, or an agreement that set counsel's fee as a percentage of the client's financial recovery.

Use of the lodestar raised the following issues: Whether it compensated for counsel's risk of nonpayment under contingency agreements; and, if it did not, whether the lodestar award should be augmented by paying winning counsel retained under a contingency agreement the lodestar fee plus an additional amount, a "contingency enhancement," often calculated as a percentage of the lodestar, to offset this risk. Before *Dague*, courts had generally concluded that *Delaware Valley II*

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3. The Merit Systems Protection Board's (the Board) experience with contingency agreements is somewhat different. Agreements may, upon successful prosecution of the appeal, call for such arrangements as merely the payment of the statutory fees awarded, or for the statutory fees plus some additional amount such as a percentage of the back pay award, or a multiplier of the statutory fees awarded.

4. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973). In *Lindy*, the court awarded fees in an action under the Clayton Act, 15 U.S.C. § 15 (1988 & Supp. 1990). The court viewed a lower court's use of factors other than the hours spent by counsel and his hourly rate as making meaningful review of attorney fee awards difficult, and giving little guidance to attorneys and claimants. This case thereby effectively adopted the lodestar method of computing attorney fees. *Lindy*, 487 F.2d at 168.

5. 465 U.S. 886 (1984).

required such contingency enhancements.

Having concluded that contingency enhancements were required to compensate attorneys for the risk of non-payment in contingency cases in order to award a "reasonable" fee as required by most federal fee-shifting statutes, the next question was how to determine such contingency enhancements. Prior to 1987, many courts and administrative adjudicators compensated for counsel's assumed risk of non-payment in cases involving contingency agreements by assessing the risk of loss at the time that the attorney and client entered into the contingency agreement.<sup>6</sup> After 1987, when the Supreme Court issued *Delaware Valley II*, courts and administrative adjudicators attempted to apply the market approach outlined in Justice O'Connor's concurring opinion in that case.<sup>7</sup>

## II. THE SUPREME COURT'S FORMER POSITION:

### *PENNSYLVANIA V. DELAWARE VALLEY* *CITIZENS' COUNCIL FOR CLEAN AIR*

From 1987 until the issuance of *Dague* in June 1992, *Delaware Valley II* dictated the standards for the award of contingency enhancements under federal fee-shifting statutes.<sup>8</sup> That case concerned an award of attorney fees under a federal fee-shifting statute<sup>9</sup> to a citizens' group which successfully sued the Commonwealth of Pennsylvania over provisions of the Clean Air Act.<sup>10</sup> The Supreme Court reversed the Third Circuit's decision, which had doubled the lodestar for certain phases of the litigation to reward the plaintiffs' attorneys for assuming the risk of

6. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Andress v. Department of Transp.*, 23 M.S.P.B. 260 (1984).

7. *Delaware Valley II*, 483 U.S. at 731 (O'Connor, J., concurring).

8. In *Delaware Valley Citizens' Council for Clear Air v. Pennsylvania*, 478 U.S. 546 (1986) [hereinafter *Delaware Valley I*], the predecessor of *Delaware Valley II*, the Supreme Court examined the issues of whether the Clean Air Act, 42 U.S.C. § 7410 (1988 & Supp. 1990), authorizes attorney fee awards for time spent by counsel participating in regulatory proceedings in addition to time spent in litigation, and whether a court may enhance an award to reflect the superior quality of representation. *Delaware Valley I*, 478 U.S. at 548. See also *The Scope of Attorney's Fees Under Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 14 *ECOLOGY L.Q.* 517, 517-39 (1987). This article does not concern the issues decided in *Delaware Valley I*.

9. There are currently more than 100 federal fee-shifting statutes. For a list of many of these statutes, see *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985).

10. 42 U.S.C. § 7410.

loss.

Justice White, writing on behalf of a plurality that included Chief Justice Rehnquist, and Justices Powell and Scalia, concluded that Congress did not intend to permit enhancement of an otherwise reasonable lodestar to compensate an attorney for assuming the risk of loss in a contingency case.<sup>11</sup> Justice O'Connor, in a concurring opinion, agreed with the plurality that the district court had erred in augmenting the lodestar amount with a contingency enhancement award in that case.<sup>12</sup> But she also agreed with four dissenting Justices that Congress intended to permit contingency enhancements when computing reasonable attorney fees under fee-shifting statutes.<sup>13</sup> Justice Blackmun, joined by Justices Marshall, Brennan, and Stevens, reasoned that Congress intended to allow contingency enhancements under fee-shifting statutes in order to "place contingency employment *as a whole* on roughly the same economic footing as noncontingency practice."<sup>14</sup> Thus, no single opinion reflected the views of a majority of the Court.

Due to various cross endorsements among the three opinions in *Delaware Valley II*, courts began to rely on the market approach test, formulated in Justice O'Connor's concurring opinion, which called for enhancements based on a market treatment of contingency agreements as a class. This market approach was determined to be the controlling view, because it was endorsed in Justice Blackmun's dissenting opinion.<sup>15</sup> Almost all circuits,<sup>16</sup> including the Federal Circuit, adopted the market approach test in some fashion.

The market approach, according to Justice O'Connor's opinion, required courts to base contingency enhancements on the local or other relevant market's treatment of contingent fee cases as a class. Under the market approach, court determinations of how a particular market compensated for contingency should control future cases involving the same market. If a fee applicant attempted to prove that the relevant market provided greater compensation for contingency than other markets previously provided, the applicant needed to point to differences between those markets which would justify the different rates of compensation. The fee applicant bore the burden of proving the degree to

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11. *Delaware Valley II*, 483 U.S. 711, 727-31 (plurality opinion).

12. *Id.* at 733 (O'Connor, J., concurring).

13. *Id.* at 731 (O'Connor, J., concurring); *id.* at 735-40 (Blackmun, J., dissenting).

14. *Id.* at 745-46 (Blackmun, J., dissenting).

15. *Id.* at 733-34 (O'Connor, J., concurring). *See, e.g.*, *Fadhli v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1988). *But see King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 3054 (1992).

16. In *King v. Palmer*, discussed in the text below, the District of Columbia Circuit adopted the plurality opinion in *Delaware Valley II* as the opinion of the Court.

which the relevant market compensated for contingency. However, a court could not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel. Furthermore, no enhancement is appropriate unless the applicant can establish that, without an adjustment for risk, the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market. Finally, no enhancement should be based on the novelty or complexity of a particular case.<sup>17</sup>

Practical experience with the market approach shows some flaws in its implementation, however. As the circuit courts' experiences show, over time, once the proof requirements are mastered, application of the market approach leads to contingency enhancement in virtually all cases. Additionally, fulfilling proof requirements is likely to turn the fees portion of the case into full blown litigation every time a locality's or market's contingency enhancement percentage is being set or amended.

### III. PROBLEMS ENCOUNTERED IN CIRCUIT COURT INTERPRETATIONS OF *DELAWARE VALLEY II*

As circuit courts attempted to implement the market approach outlined by Justice O'Connor in *Delaware Valley II*, conflicts with other well-established Supreme Court precedent became apparent. These included the discovery that using such a market approach could well lead to the award of risk premiums as the rule, not the exception, contrary to *Blum v. Stenson*.<sup>18</sup> The market approach test was also likely to convert the attorney fee phase of federal cases into major litigation, contrary to long-standing Supreme Court guidance in *Hensley v. Eckerhart*.<sup>19</sup> The circuit courts resolved neither of these problems prior

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17. *Delaware Valley II*, 483 U.S. 711, 731-34 (1987).

18. 465 U.S. 886, 898-901 (1984). Awarding attorney contingency enhancements as the rule appears to be the result of the Ninth Circuit's interpretation of Justice O'Connor's concurring opinion, see *Fadhi*, 859 F.2d at 650-51; *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1384 (9th Cir. 1990), and was the result of the District of Columbia Circuit's interpretation of that opinion before its decision in *King*. See, e.g., *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989).

19. 461 U.S. 424, 437 (1983). See also *Delaware Valley II*, 483 U.S. at 722 (fee litigation "should be simplified to the maximum extent possible"); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (noting that the case came to court in 1981 and between 1985 and 1988 the litigation revolved solely around attorney's fees, inconsistent with the Supreme Court's guidance that attorney

to the issuance of *Dague*.

Additionally, there was no circuit court consensus on how to apply the market approach of *Delaware Valley II*.<sup>20</sup> Even after five years of interpretation, two basic evidentiary questions of any practicing lawyer were left unsettled: What do I need to show to prove entitlement to a contingency enhancement? What showing is necessary to establish a specific multiplier?

Some circuit courts directly followed Justice O'Connor's market approach, which treated contingency cases as a class, without reference to the Court's plurality opinion. These courts used different tactics, however, to apply the market approach, differing most notably on the quantum of proof required of the party seeking a contingency enhancement. Contrasting decisions of the Third and Ninth Circuits most clearly illustrate this dichotomy.

The Third Circuit, in *Blum v. Witco Chemical Corporation*,<sup>21</sup> discussed the difficulties of proof it envisioned for parties seeking a contingency enhancement. In *Blum*, the court remanded the attorney fee aspect of the case for consideration of a contingency enhancement.<sup>22</sup> The court instructed that, on remand, the plaintiffs must develop an evidentiary presentation that would probably require expert testimony from someone familiar with the economics of the legal profession, perhaps an expert economist.<sup>23</sup> The court suggested that it might even be necessary to develop an econometric model<sup>24</sup> of the market practice regarding contingency cases in order to prove the market practice.<sup>25</sup>

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fee proceedings not be a second major litigation).

20. This premise appears to be borne out by the difference between the Eleventh Circuit's view of *Delaware Valley II* and the interpretation given *Delaware Valley II* by the district courts within the Eleventh Circuit. Although the Eleventh Circuit in *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), took a very restrictive view of when a contingency enhancement was appropriate, a number of district courts within the Eleventh Circuit awarded handsome contingency enhancements, often of 100%. See Alice M. Bradley & Bryan Essary, Comment, *The Treatment of Attorney's Fee Enhancements in Alabama and the Eleventh Circuit: Justice! The Law My Ducats and My Daughter!*, 20 CUMB. L. REV. 769, 787-93 (1990).

21. 829 F.2d 367 (3d Cir. 1987). In *Blum*, the jury found a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. 1992). *Blum*, 829 F.2d at 370.

22. *Id.* at 383.

23. *Id.* at 380.

24. *Id.* An econometric model would apply statistical methods to the economic data of contingency legal practice. See generally WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY, 262 (1965).

25. *Blum*, 829 F.2d at 380. Subsequently, in *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990), the Third Circuit reiterated its earlier holding that plaintiffs bear the burden of establishing entitlement to a contingency enhancement, and held that the district court did not abuse its discretion in finding that three affidavits, indicating

In contrast to the difficulty of proof envisioned by the *Blum* court, the Ninth Circuit affirmed a district court's award of a 100 percent enhancement of the lodestar fee award based on a much lighter evidentiary showing in *Fadhl v. City and County of San Francisco*,<sup>26</sup> a case involving only the question of a contingency enhancement.<sup>27</sup> The court relied solely on the following to prove entitlement to an enhancement: A San Francisco practitioner's testimony that his firm would generally not accept a contingent fee case unless the anticipated fee, if successful, were equal to twice the value of the firm's services billed at a normal rate;<sup>28</sup> the Ninth Circuit's earlier acknowledgement that Title VII<sup>29</sup> cases are especially unappealing to the private bar;<sup>30</sup> and the *Fadhl* plaintiff's specific difficulty in retaining counsel.<sup>31</sup>

Other circuit courts, while viewing Justice O'Connor's concurring opinion in *Delaware Valley II* as essentially controlling, sought to blend her views with aspects of the plurality opinion. For example, in *Leroy v. City of Houston*,<sup>32</sup> the Fifth Circuit held, following the plurality's direction, that contingency enhancement awards were to be reserved for exceptional circumstances.<sup>33</sup> Another circuit court, in denying a

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how two attorneys treated contingency fee cases differently than hourly rate cases, were insufficient to meet that evidentiary burden. *Id.* at 1184-85. The court opined that the important failure was not the small number of the affidavits, but the quality of their content. *Id.* at 1185. Reflecting on its earlier *Blum* opinion, the court noted that "a single person, qualified as an expert and with the proper foundation, could produce testimony that would satisfy the evidentiary requirements of *Delaware Valley II.*" *Id.*

26. 859 F.2d 649 (9th Cir. 1988).

27. In an earlier decision, the court had affirmed the district court's finding of a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. 1990), awarded a lodestar attorney fee, and reserved the issue of plaintiff's entitlement to a contingency enhancement. *Fadhl v. City and County of San Francisco*, 804 F.2d 1097, 1099 (9th Cir. 1986).

28. *Fadhl*, 859 F.2d at 650-51. Subsequently, in *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379 (9th Cir. 1990), the Ninth Circuit restated its adoption of Justice O'Connor's opinion in *Delaware Valley II* and defined a contingent fee arrangement as an exceptional circumstance requiring the enhancement if Justice O'Connor's test is met. *Id.* at 1384.

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000.

30. *Fadhl*, 859 F.2d at 651.

31. *Id.* The plaintiff approached 35 lawyers before she found one who would represent her. *Id.*

32. 831 F.2d 576 (5th Cir. 1987).

33. *Id.* at 583. The court did not define the term exceptional, but it found three issues irrelevant to a determination of whether to award a risk enhancement: the



contingency enhancement, relied on the plurality's admonition that a contingency enhancement award should be informed by the statutory purpose of making it possible for "poor clients with good claims to secure competent help."<sup>34</sup> Other circuit courts also cited the plurality's finding in *Delaware Valley II* that, as a general rule, the contingency enhancement should not be more than one third of the lodestar.<sup>35</sup> Finally, one circuit court overturned a denial of enhancement, and instructed district courts to account for the contingent nature of the compensation by assessing the riskiness of litigation, which directly contradicted Justice O'Connor's concurring opinion.<sup>36</sup>

In contrast to all other circuit courts, the District of Columbia Circuit reversed its prior decisions which followed the market approach in awarding contingency enhancements.<sup>37</sup> Instead, it articulated an alternative view of *Delaware Valley II* which, in light of *Dague*, appears prescient. Five years after adopting Justice O'Connor's decision as controlling in *Save Our Cumberland Mountains, Inc. v. Hodel*,<sup>38</sup> a case

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unpopularity of the plaintiff's position; the difficulty of working with an obstreperous plaintiff; and the importance of contingency enhancements to attracting lawyers to civil rights cases. *Id.* at 584.

A similar approach is reflected in a decision of the Tenth Circuit, in *Smith v. Freeman*, 921 F.2d 1120 (10th Cir. 1990). The court agreed with the *Delaware Valley II* plurality that enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and supported by both evidence in the record and specific findings by the courts. *Id.* at 1123.

Likewise, the Eleventh Circuit, in *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), reserved contingency enhancements for exceptional circumstances. *Id.* at 1302.

34. *Spell v. McDaniel*, 824 F.2d 1380, 1404 (4th Cir. 1987), *cert. denied*, *North Carolina v. Spell*, 484 U.S. 1027 (1988) (citing *Delaware Valley II*, 483 U.S. at 730-31).

35. *See, e.g., Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989) (citing *Delaware Valley II*, 483 U.S. at 730).

36. *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). Considering the litigation risks of the particular case is the plurality opinion's fallback position in Part V of *Delaware Valley II*, which Justice O'Connor specifically rejected.

37. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991). Prior to its decision in *King*, the District of Columbia Circuit issued a series of cases awarding contingency enhancements under the guidance of *Delaware Valley II*. *See also Thompson v. Kennickell*, 836 F.2d 616 (D.C. Cir. 1988); *Weisberg v. Department of Justice*, 848 F.2d 1265 (D.C. Cir. 1988). In *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), the court had fully addressed the issue of contingency enhancements, and established a regime in which contingency enhancements of reasonable attorney fees would be routinely available under statutory fee-shifting statutes.

38. 826 F.2d 43 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). The District of Columbia Circuit acknowledged the holding of *Delaware Valley II* that a contingency multiplier could be awarded under attorney fee statutes, but only if based upon an assessment of the market treatment of contingen-

involving an award of attorney fees after a successful private enforcement action under the Surface Mining Control and Reclamation Act of 1977,<sup>39</sup> the District of Columbia Circuit reversed itself in *King v. Palmer*.<sup>40</sup>

In *King*, a case involving attorney fees for a successful Title VII gender discrimination claim, the court rejected Justice O'Connor's opinion in *Delaware Valley II* in favor of Justice White's plurality opinion.<sup>41</sup> The *King* majority concluded that a reasonable lodestar fee awarded under federal fee-shifting statutes may never be enhanced to compensate a prevailing party for the initial risk of loss.<sup>42</sup> The majority applied *Marks v. United States*,<sup>43</sup> which held that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds.<sup>44</sup> The court held that, under *Marks*, Justice O'Connor's opinion could be considered controlling only if it narrowed the plurality's approach to the question.<sup>45</sup> The court found under the *Marks* test that it could not consider Justice O'Connor's concurrence as a subset of the plurality, because it adopted a classwide approach to risk assessment while the plurality opinion did not.<sup>46</sup> Unlike the plurality, the court observed, Justice O'Connor refused to allow the risks<sup>47</sup> of an individual case to affect the enhancement question, opting for a market approach instead.<sup>48</sup> Thus, the District of Columbia Circuit concluded that her opinion described an altogether different approach, not a narrower one.<sup>49</sup> Hence, it was not

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cy cases as a class, rather than an assessment of any particular case's degree of risk.

39. *Hodel*, 826 F.2d at 45-46 (finding a violation of 30 U.S.C. § 1270(a) (1982)).

40. *King*, 950 F.2d at 785.

41. *Id.* at 775.

42. *Id.* at 784.

43. 430 U.S. 188 (1977).

44. *King*, 950 F.2d at 782-83 (citing *Marks*, 430 U.S. at 193).

45. *Id.* at 783.

46. *Id.*

47. In *Delaware Valley II*, the plurality defined risk as "measured by the risk of losing rather than winning and depends on how unsettled the applicable law is with respect to the issues posed by the case and by how likely it is that the facts could be decided against the complainant." *Delaware Valley II*, 483 U.S. 711, 715-16 (1992).

48. *King*, 950 F.2d at 783.

49. *Id.* at 777 (citing *Marks*, 430 U.S. at 193). The District of Columbia Circuit specifically rejected the position of the Third Circuit that Justice O'Connor's opinion can be regarded as a subset of the dissent, and, as such, would speak for a majority of

controlling.

#### IV. THE MERIT SYSTEMS PROTECTION BOARD'S INTERPRETATION OF *DELAWARE VALLEY II*

The Civil Service Reform Act of 1978 (CSRA),<sup>50</sup> which introduced new management flexibility in the federal civil service, also established the Merit Systems Protection Board to strengthen employee due process protections. The Board has jurisdiction over appeals from major personnel actions made appealable by statute or by regulation of the Office of Personnel Management affecting the vast majority of federal career civil servants.<sup>51</sup>

To help the Board accomplish its mission effectively, and to ensure that innocent appellants and those with meritorious claims did not lose their jobs because they could not afford legal assistance,<sup>52</sup> Congress granted the Board authority to award attorney fees to prevailing appellants.<sup>53</sup> Under the CSRA, such fee awards are appropriate if: (1) Fees

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the court. *Id.* (citing *Student Pub. Interest Research Group, Inc. v. AT & T Bell Lab.*, 842 F.2d 1436, 1451 (3d Cir. 1988)).

50. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in various scattered sections of 5, 10, 15, 28, 31, 39, and 42 U.S.C.).

51. Under 5 U.S.C. §§ 7511-13 (1991), the Board has jurisdiction over appeals from competitive service employees who are not serving a probationary period or have completed one year of current continuous service not in a temporary appointment, preference eligible excepted service employees who have completed one year of current continuous service in the same or similar position, and other excepted service employees who have completed two years of current continuous service.

52. *See generally* *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 429-30 (1980) (discussing purposes behind authority to grant attorney fees).

53. Initial appeals to the Board from federal employees, who are designated as appellants for the Board's adjudicatory process, are heard and decided by administrative judges located in its eleven regional offices. *Clark v. Department of the Navy*, 12 M.S.P.R. 428 (1982). The full Board issues precedential decisions based on the parties' petitions for review of the initial decisions issued by the administrative judges. 5 C.F.R. §§ 1201.114-1201.115 (1992). Judicial review of the Board's decisions is authorized by 5 U.S.C. § 7703 (1988 & Supp. 1990). The Merit Systems Protection Board deems the decisions of the United States Court of Appeals for the Federal Circuit, which is the exclusive venue for judicial review of merit system appeals involving only federal personnel matters, as controlling. The decisions of the other circuit courts are persuasive, but not controlling authority. *See Fairall v. Veterans Admin.*, 33 M.S.P.R. 33, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987). However, Board appeals involving discrimination allegations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, the Equal Pay Act, 29 U.S.C. § 206(d) (1988), section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (1988 & Supp. 1990), and sections 12 and 15 of the Age Discrimination in Employment Act, 29 U.S.C. §§ 631, 633a (1988 & Supp. 1990), are heard by Federal District Courts, rather than the Federal Circuit, as provided in the respective statutes. 5 U.S.C. §§ 7702(e)(1), 7703(b)(2) (1988).

were "incurred";<sup>54</sup> (2) their payment is "warranted in the interest of justice";<sup>55</sup> and (3) they are "reasonable."<sup>56</sup> For those who establish that the employing agency engaged in prohibited race, sex (including equal pay violations), color, national origin, age, or handicap discrimination, reasonable attorney fee awards are available under Title VII standards, which, while still requiring that fees be reasonable and incurred, do not require proof that the fees are warranted in the interest of justice.<sup>57</sup>

Prior to *Delaware Valley II*, the Board only once awarded a contingency enhancement, using the standard of compensating only for the risk of not being paid at all in the particular case. Prior to this award, however, the Board in *Kling v. Department of Justice*,<sup>58</sup> a non-contingency case awarding attorney fees for a prevailing appellant, developed some general guidelines for future parties to cases requesting

54. Fees are incurred when an attorney-client relationship exists between counsel and an appellant, and counsel renders legal services on behalf of the appellant in an appeal before the Board. *O'Donnell v. Department of the Interior*, 2 M.S.P.R. 445, 454 (1980).

55. In *Allen*, the Board set forth the following examples of situations where an award of attorney fees would be "warranted in the interest of justice" under 5 U.S.C. § 7701(g) (1988): (1) Where the agency engaged in a "prohibited personnel practice"; (2) where the agency's action was "clearly without merit," or was "wholly unfounded," or the employee is "substantially innocent" of the charges; (3) where the agency initiated the action against the employee in "bad faith"; (4) where the agency committed a "gross procedural error" that "prolonged the proceeding" or "severely prejudiced" the employee; or (5) where the agency "knew or should have known that it would not prevail on the merits" when it brought the action. *Allen*, 2 M.S.P.R. at 434-35.

56. Reasonableness is an overarching principle in attorney fee cases. Even if the fee request is well documented, if the amount proves unreasonable, it can be reduced by the administrative judge who hears the case. The full Board on review gives great deference to the administrative judge's reasonableness determination, though it, like other findings of fact, can be overturned. In its early cases, the Board determined that, although the amount of a reasonable attorney fee would be calculated by identification and consideration of the pertinent factors among the 12 identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), most factors are accounted for by two objective variables: (1) the lawyer's customary hourly billing rate; and (2) the number of hours devoted to the case. *Kling v. Department of Justice*, 2 M.S.P.R. 464, 471-73 (1980). Generally, the Board awards fees at the prevailing community rate for similar work. See *Blumenson v. Department of Health & Human Servs.*, 30 M.S.P.R. 644 (1986).

57. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; 5 U.S.C. § 7701(g)(2).

58. 2 M.S.P.R. 464 (1980).

attorney fees.<sup>59</sup> The Board stated in *Kling* that when counsel's compensation is contingent on success, the Board would consider adjusting the award upward to compensate for the risk the attorney had accepted of not being paid at all in that particular case.<sup>60</sup> Subsequently, the Board applied the guidelines in *Andress v. Department of Transportation*.<sup>61</sup> According due deference to the administrative judge, who favorably assessed the risk factor involved and the conscientious and exemplary representation by counsel, the Board found reasonable a contingency enhancement equaling ten percent of back pay.<sup>62</sup>

While *Delaware Valley II* was pending before the Supreme Court, *Crumbaker v. Department of Labor (Crumbaker I)*,<sup>63</sup> a Board case denying contingency enhancement,<sup>64</sup> was pending before the Federal Circuit. In *Crumbaker I*, the Board denied the enhancement where counsel had accepted the case on contingency only after significant involvement while receiving payment at the hourly rate demonstrated that the appellant would prevail, thus reducing the risk of loss to virtually zero.<sup>65</sup> Upon issuance of *Delaware Valley II*, the Federal Circuit remanded the case, instructing the Board to analyze the appellant's request for a 100 percent contingency enhancement in light of Justice O'Connor's opinion.<sup>66</sup> On remand, the Board concluded in *Crumbaker v. Department of Labor (Crumbaker II)*<sup>67</sup> that, in light of the Federal Circuit's instructions, it would no longer assess the risk of a particular case to determine an award of a contingency enhancement,<sup>68</sup> but would look to "the difference in market treatment of contingent fee cases as a class."<sup>69</sup>

*Crumbaker II* furnished guidance on three key issues in an area the

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59. *Id.* at 472.

60. *Id.* at 473.

61. 23 M.S.P.R. 260 (1984). The Board held that, where the fee agreement provided for an hourly rate of \$75.00 divided among six appellants, plus 10% of the combination of annual base pay and back pay, an upward adjustment of the lodestar by 10% of base pay and back pay was excessive, although an upward adjustment equaling 10% of back pay alone was reasonable. *Id.* at 264-65.

62. *Id.*

63. 24 M.S.P.R. 627 (1984) [hereinafter *Crumbaker I*].

64. *Id.* at 635.

65. *Id.*

66. *Crumbaker v. Merit Sys. Protection Bd.*, 827 F.2d 761 (Fed. Cir. 1987). See also *Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1584 (Fed. Cir. 1991).

67. 40 M.S.P.R. 71 (1989) [hereinafter *Crumbaker II*].

68. *Id.* at 80.

69. *Delaware Valley II*, 483 U.S. 711, 730. Classified, or "across-the-board," risk enhancements employ a standard multiplier—unrelated to the contingencies of a particular case—for every case within a class of cases. See *Leading Cases*, 101 HARV. L. REV. 119, 292 n.14 (1987) (citing John Leubsdorf, *The Contingency Fee Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 501, 511 (1981)).

Board was to learn was laden with numerous issues. It determined the geographic market for which market treatment must be proved.<sup>70</sup> It determined the proof acceptable to show market treatment.<sup>71</sup> It further established that the appellant need not prove that counsel chosen was the least expensive provider of services.<sup>72</sup>

The first issue the Board resolved in *Crumbaker II* was determining which market to use in calculating the contingency enhancement. The Board found that the relevant geographic market was where the appellant resided when the case arose and where the hearing was held,<sup>73</sup> rather than where the appellant's counsel practiced.<sup>74</sup> Thus, in *Crumbaker II*, the Board based its enhancement decision on evidence of the treatment of contingent fee cases as a class in Seattle, Washington, and refused to consider such evidence from Dallas, Texas, where the appellant's counsel practiced.<sup>75</sup>

Additionally, *Crumbaker II* addressed the amount of proof required to show market treatment of contingency cases as a class.<sup>76</sup> The appellant proffered two unrefuted affidavits in which Seattle attorneys described their area's practice regarding contingency fee cases. These affidavits asserted that the hourly rates for successful contingency cases were twenty percent to forty percent higher than the rates usually charged in noncontingency cases. The Board found this sufficient to determine that a twenty percent contingency enhancement, the lowest enhancement necessary to attract competent counsel, was appropriate.<sup>77</sup>

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70. *Crumbaker II*, 40 M.S.P.R. at 78-79.

71. *Id.*

72. *Id.* at 80.

73. The Board has also held the parties may stipulate to the relevant market if the hearing took place within the stipulated geographic area. *Estate of Lizut v. Department of the Army*, 51 M.S.P.R. 549, 556 (1991).

74. Determination of counsel's hourly rate for purposes of calculating the lodestar award was based on his billing rate in the area where he practiced. *Crumbaker I*, 24 M.S.P.R. 627, 630 (1984).

75. *Crumbaker II*, 40 M.S.P.R. at 78-79.

76. *Id.*

77. *Id.* The proof required of the party seeking a contingency enhancement most closely resembles the lighter Ninth Circuit requirement. *See supra* notes 26-31 and accompanying text. However, due to the Board's later adoption of *Green v. Department of the Navy*, 43 M.S.P.R. 34, 38 (1989) (requiring the party requesting a contingency enhancement to explain market differences that account for any difference in the rate requested and enhancements already awarded by the Board), discussed further below, the Board showed signs of developing a higher burden of proof to show entitlement

Finally, *Crumbaker II* established that the appellant need not prove that his counsel was the least expensive in the market to receive a contingency enhancement.<sup>78</sup> The agency argued that the Board should deny the enhancement because appellant's counsel failed to establish that competent attorneys, who generally charge less than the appellant's counsel, declined to take the case. The Board held, however, that nothing in *Delaware Valley II*, or in Federal Circuit decisions, required the appellant to show that another attorney refused to take his case at a lower rate in order to merit a contingency enhancement.<sup>79</sup>

After it issued *Crumbaker II*, the Board remanded a series of cases involving contingency agreements to its regional offices. The remands instructed the parties to submit evidence on the issue of contingency enhancement requests. These cases attempted to define some parameters of the parties' evidentiary burdens.<sup>80</sup> Subsequently, the Board addressed a number of other contingency enhancement issues. These issues related to the practical questions a party had to answer to establish eligibility for an enhancement, and to prove the amount of the enhancement.

In *Wilkins v. Department of the Navy*,<sup>81</sup> the Board ruled on a threshold issue concerning the burden of production. The Board held that because it requires neither a fee agreement to be in writing nor a copy of such an agreement to be submitted in a fee petition,<sup>82</sup> the parties could establish the existence of a contingency fee agreement through an affidavit of counsel which detailed the nature of the contingency fee agreement.<sup>83</sup> The Board noted, however, that under such circumstances, counsel must establish the pertinent details of the agreement, such as whether the fee agreement was entirely or partially contingent, and the date on which the contingency agreement was executed.<sup>84</sup>

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to a contingency enhancement, one which more closely resembled the Third Circuit's proof requirement.

78. *Crumbaker II*, 40 M.S.P.R. at 80.

79. *Id.* This is consistent with a number of circuit court decisions. *See, e.g., Morris v. American Nat'l Can Corp.*, 952 F.2d 200 (8th Cir. 1991).

80. *See Wilkins v. Department of the Navy*, 51 M.S.P.R. 290 (1991); *Lizut v. Department of the Navy*, 42 M.S.P.R. 3, 9-10 (1989); *Mercer v. Department of Health & Human Services*, 42 M.S.P.R. 115, 122, 123 (1989); *Brooks v. Department of Transp.*, 42 M.S.P.R. 125, 128 (1989); *Craven v. Office of Personnel Management*, 42 M.S.P.R. 128, 136-37 (1989); *Brown v. Department of Health & Human Services*, 42 M.S.P.R. 291, 297 (1989); *Hutchison v. Department of Health & Human Services*, 42 M.S.P.R. 302, 310-11 (1989); *Gonczl v. Office of Personnel Management*, 41 M.S.P.R. 671, 676-77 (1989).

81. 51 M.S.P.R. 290 (1991).

82. *Sprengr v. Department of the Interior*, 34 M.S.P.R. 664, 668 (1987).

83. *Wilkins*, 51 M.S.P.R. at 293.

84. *Id.*

In *Gonczi v. Office of Personnel Management*,<sup>85</sup> the Board established that the appellant, as the party seeking the enhancement, had the initial burden of proof of entitlement to contingency enhancement.<sup>86</sup> Subsequently, the Board set forth a two-tier test to prove entitlement to an enhancement in *Brown v. Department of Health & Human Services*.<sup>87</sup> In *Brown*, the Board held that the appellant first must show that the market compensated contingency agreements at a higher rate than other fee agreements.<sup>88</sup> If this was proved, the appellant then needed to document the higher rate.<sup>89</sup>

The Board decided two cases which provide additional guidance to answer *Brown's* first tier question: Whether the market compensates contingency agreements at a higher rate than other fee agreements. First, in *Crumbaker II* the Board found that the relevant geographic market was the location where the appellant resided when the case arose and/or where the hearing was held.<sup>90</sup> Then, in *Jones v. Department of the Navy*,<sup>91</sup> the Board determined the relevant product market. In *Jones*, the Board determined that O'Connor's statements regarding difficulties in finding counsel in the local or other relevant market compelled the inquiry of whether an appellant seeking representation in an *employment case*, of the type heard by the Board, would find counsel willing to accept the case on a contingency basis in the absence of a contingency enhancement.<sup>92</sup> The Board concluded, probably based upon the type of practice of attorneys who generally appear before the Board, that its relevant product market did not include all contingency claims such as personal injury contingency claims. Rather, its relevant product market included all employment law contingency claims in the relevant geographic market.

In *Brown*, the Board did not reach the second tier of the test, the issue of the rate of the appropriate contingency enhancement, in light of the appellant's failure to establish that the relevant market compensated contingency fee arrangements at a higher rate than other work.

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85. 41 M.S.P.R. 671 (1989).

86. *Id.* at 676 (citing *Crumbaker v. Merit Systems Protection Bd.*, 827 F.2d 761 (D.C. Cir. 1987)).

87. 50 M.S.P.R. 523 (1991).

88. *Id.* at 531-32.

89. *Id.*

90. *Crumbaker II*, 40 M.S.P.R. 71, 78-79 (1989).

91. 51 M.S.P.R. 542 (1991).

92. *Jones*, 51 M.S.P.R. at 548.



Significantly, the Board did not consider court decisions awarding enhancements within the relevant market as evidence sufficient to establish the market treatment of contingency cases.<sup>93</sup>

Three Board decisions were relevant to the second question of the *Brown* two-tier test regarding the appropriate contingency enhancement rate. First, *Crumbaker II* found that two unrefuted affidavits, in which local market attorneys described their locality's practice regarding contingency fee cases, were sufficient to establish the market rate for contingency cases.<sup>94</sup> However, in *Green v. Department of the Navy*,<sup>95</sup> the Board held that if the attorney requesting the enhanced fee award prepared either affidavit, the two affidavits would be insufficient, without more, to prove entitlement to an enhancement.<sup>96</sup> Finally, the Board adopted a rebuttable presumption that the maximum enhancement was the one-third-of-the-lodestar maximum enhancement posited by the plurality in *Delaware Valley II*.<sup>97</sup> Therefore, if an appellant showed that the relevant market compensated contingency agreements at a higher rate than other fee agreements, he also had to prove, *inter alia*, why any rate exceeding one third of the lodestar would be warranted.

Most courts ignored Justice O'Connor's instruction in *Delaware Valley II* that "[d]eterminations involving different markets should also comport with each other . . . [and] the applicant should be able to point to differences in the markets that would justify the different rates of compensation."<sup>98</sup> The Board, however, applied this instruction. In *Green v. Department of the Navy*,<sup>99</sup> the Board held that contingency enhancement fee applicants should be able to point to market differences that would justify their requests for different enhancement rates.<sup>100</sup> The Board remanded *Green* to allow the appellant to provide detailed evidence explaining the differences between his market and any other markets in which the Board had awarded contingency enhancements.<sup>101</sup> After *Green*, the Board remanded all other cases, as all failed

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93. *Brown v. Department of Health & Human Services*, 42 M.S.P.R. 291 (1989).

94. *Crumbaker II*, 40 M.S.P.R. 71, 78-79 (1989).

95. 43 M.S.P.R. 34 (1989).

96. *Id.* at 38. The case restated the rule that the Board had established in *Crumbaker II*. In *Crumbaker II* the Board provided: The minimum evidence necessary to support a request for a contingency enhancement is affidavits from two attorneys not professionally affiliated with the employee's attorney who practice in the relevant market. *Crumbaker II*, 40 M.S.P.R. at 80.

97. See *Jones v. Department of the Navy*, 51 M.S.P.R. 542, 548 (1991). The Board adopted this position because the concept is consistent with Justice O'Connor's opinion, and does not introduce new elements, such as exceptional circumstances.

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

99. 43 M.S.P.R. 34, 38 (1989).

100. *Id.* at 38.

101. *Id.* At the time *Green* was decided, the Board had made findings regarding

to address market differences that would justify the different enhancement rates for further evidence on the issue.<sup>102</sup>

The Board's efforts to apply *Delaware Valley II* in accordance with the Federal Circuit's instructions held Board practitioners to strict proof of their requests. Practitioners' evidence had to establish the following: The existence of a contingency fee agreement between the attorney and the client, and the date and terms of that agreement; the relevant geographic and product market; that market's practice regarding employment cases accepted on a contingency fee basis, including whether the market compensated such cases at a higher rate than non-contingency cases, and what that rate was; the reasons for any difference between that market's practice and the practice in other markets in which the Board had awarded contingency enhancements; and, if the market practice was to compensate contingency fee employment cases at a rate higher than one and one-third times the compensation of non-contingency cases, the justification for the amount over the presumed maximum of one third of the lodestar.

In summary, in the five years after the issuance of *Delaware Valley II*, the Board was able to determine and award a contingency enhancement in only one case due to all the questions that the market approach raised. This suggests that the market approach test is not a particularly good approach for dealing with contingency enhancement issues. Fortunately, the Supreme Court provided some additional guidance in this area.

#### V. THE COURT'S CURRENT POSITION:

##### *CITY OF BURLINGTON V. DAGUE*

In *City of Burlington v. Dague*,<sup>103</sup> the Court, in a six-to-three opinion, held that the typical federal fee-shifting statute does not permit an attorney's fee award to be enhanced beyond the lodestar amount to reflect the fact that a party's attorney was retained on a contingency-fee

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only one market, Seattle; this market compensates successful contingency cases at 20% above the cost of non-contingency cases. See *Crumbaker II*, 40 M.S.P.R. at 71.

102. Many of the cases requesting contingency enhancements are from only a few attorneys. Though several cases have since come to the Board without the now-required evidence of market differences, at least two of these cases are from the attorney in *Green*, and most of these cases were originally submitted prior to the issuance of *Green*.

103. 112 S. Ct. 2638 (1992).

basis.<sup>104</sup> The *Dague* majority, therefore, adopted the plurality opinion that Justice White authored in *Delaware Valley II*.<sup>105</sup> The Court specifically rejected the market approach advocated in Justice O'Connor's concurring opinion in *Delaware Valley II*.<sup>106</sup> The Court reasoned that Justice O'Connor based her market approach in *Delaware Valley II* upon mutually inconsistent propositions.<sup>107</sup> On the one hand, the approach required parties seeking contingency enhancement to establish that without the risk adjustment they would face substantial difficulties in finding counsel in the relevant market, and on the other hand, it forbade enhancements based on the assessment of specific case riskiness. The Court stated that this is a circular test for federal fee-shifting contingency fee cases because the market for most federal fee-shifting cases is artificial, having been created by enacting fee-shifting statutes.<sup>108</sup> Plaintiffs in many federal fee-shifting cases seek injunctive or equitable relief. The market for these plaintiffs would not exist except for the fee-shifting statutes. There was no way a market approach to contingency fee awards could achieve the supposed goal of mirroring market incentives of attorneys to take cases because that market is driven by a factor that, under the market approach, cannot be used to determine the contingency enhancement: namely, counsel's assessment of the riskiness of an individual case.<sup>109</sup>

The Court further opined that, beyond the market approach, the fee-shifting statutes provide no other basis by which a court could restrict contingency enhancement, if adopted, to fewer than all contingency-fee cases.<sup>110</sup> The Court stated that contingency enhancement is not compatible with the many fee-shifting statutes because such enhancement would, in effect, pay for the attorney's time (or anticipated time) where his client does not prevail.<sup>111</sup> This seems to contravene the legislative intent since the statutory language prevents recovery of fees by plaintiffs who do not prevail.<sup>112</sup> Additionally, the majority held that contingency enhancement is unnecessary to determine a reasonable fee, and is inconsistent with the Court's rejection of the contingent-fee model in

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104. *Id.* at 2645.

105. Compare *id.* with *Delaware Valley II*, 483 U.S. 711 (1987).

106. *Dague*, 112 S. Ct. at 2645. See *Delaware Valley II*, 483 U.S. at 733 (O'Connor, J., concurring).

107. *Dague*, 112 S. Ct. at 2645. The majority in *Dague* specifically stated, regarding the market approach in *Delaware Valley II*, "[W]e do not see how it can intelligently be applied." *Id.* at 2649.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

favor of the lodestar model, because the lodestar model reflects counsel's hourly rate and number of hours devoted to the case, and inherently takes risk into account.<sup>113</sup> Finally, the Court determined that adopting contingency enhancement would make the setting of fees more complex and arbitrary, thereby encouraging more litigation, something the Court has generally not supported.<sup>114</sup>

The majority opinion in *Dague* provides an extremely simplistic application: if attorney fees are awarded, then the lodestar is calculated.<sup>115</sup> This simplicity is in sharp contrast to the complex and difficult application of *Delaware Valley II*.<sup>116</sup>

*Dague* is far-reaching. The Court stated that its opinion disallowing a contingency enhancement applied to all fee-shifting statutes that award "reasonable" attorney fees.<sup>117</sup> Indeed, the Court left no doubt that *Dague* applied to the Civil Rights Attorney Fee Act,<sup>118</sup> Title VII of the Civil Rights Act of 1964,<sup>119</sup> the Clean Air Act,<sup>120</sup> and the specific statutes under which fees were awarded in the case before the Court,<sup>121</sup> the Solid Waste Disposal Act<sup>122</sup> and the Clean Water Act.<sup>123</sup> While the Supreme Court did not list all the fee-shifting statutes, other courts will almost certainly apply *Dague* to other fee-shifting statutes that the Court did not identify.<sup>124</sup> *Dague* relied on the Supreme Court's empha-

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113. *Id.*

114. *Id.*

115. *Id.*

116. See *supra* text accompanying notes 18-104.

117. *Dague*, 112 S. Ct. at 2655.

118. 42 U.S.C. § 1988 (1988).

119. 42 U.S.C. § 2000e-5k.

120. 42 U.S.C. § 7604(d) (1988).

121. *Dague*, 112 S. Ct. at 2693.

122. 42 U.S.C. § 6972(e) (1988).

123. 33 U.S.C. § 1365(d) (1988).

124. *Dague* applies to the Board's attorney fee cases. *Pecotte v. Department of the Air Force*, M.S.P.R. Docket No. SF075289A 0240 (Aug. 25, 1992). In *Pecotte*, the Board reasoned as follows: The Board "may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice." 5 U.S.C. § 7701(g)(1). The Board may also award fees "[i]f an employee or applicant is the prevailing party and the decision is based on a finding of [prohibited] discrimination . . ." 5 U.S.C. § 7701(g)(2). Furthermore, 5 U.S.C. § 2302(b)(1) (1988) prohibits personnel from discriminating against a federal employee or applicant for employment based on race, sex (including equal pay violations), national origin, color, religion, age, handicap, marital status, or political affiliation. When the Board awards attorney fees based on a finding of discrimination, the

sis on "ready administratibility."<sup>125</sup> In doing so, *Dague* eliminated the subjectivity and uncertainty that had colored questions on contingency enhancement. Thus, *Dague* provides the Board, other administrative bodies, and the courts with a sure-footed and swift approach in attorney fee cases involving federal fee-shifting statutes.

The dissenting opinion of Justice Blackmun discussed some sound points that are relevant to the broad application of *Dague*.<sup>126</sup> The dissent contended that the majority view was inconsistent with the Court's prior holding that a reasonable fee attorney's fee award should be fully compensatory and should reflect the risk taken by attorneys regarding the contingency of their compensation.<sup>127</sup> Moreover, Justice Blackmun argued that to effect Congressional intent of attracting competent counsel to take cases arising under fee-shifting statutes, counsel must be assured of receiving fees commensurate with those they could obtain in other litigation.<sup>128</sup>

## VI. IMPLICATIONS OF THE CIRCUIT COURTS' AND THE BOARD'S EXPERIENCES FOR THE FUTURE OF CONTINGENCY ENHANCEMENT

After *Dague*, incentives in addition to the lodestar award will be available only through legislative intervention. As Justice Blackmun's dissent in *Dague* noted, disallowing a contingency enhancement could lessen the incentive of seasoned practitioners to take fee-shifting cases on contingency and relegate such cases to less experienced counsel or

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payment is in accordance with the standards prescribed under Title VII. 42 U.S.C. § 2000e-5(k).

*Dague* prohibits a contingency enhancement under Title VII. Thus, the Board may not award a contingency enhancement under its authority to interpret the attorney fee provisions of that statute. Additionally, *Dague* prohibits the Board from awarding a contingency enhancement under its own statutory authority. 5 U.S.C. § 7701(g)(1). The two bases of the Board's authority to award fees differ in that, to receive a fee award absent a finding of discrimination, the party moving for a fee award must also show that fees are warranted in the interest of justice. The additional requirement, however, does not materially modify the requirement that the fee award be reasonable, and it provides no real basis to exclude a fee award from the prohibition against contingency enhancements announced in *Dague*. Indeed, reasonableness is the overarching standard by which a fee award is to be measured. See *Jones v. Department of the Navy*, 51 M.S.P.R. 542, 548 (1991); see also *Blanchard v. Bergeron*, 109 S. Ct. 939, 944 (1989).

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

126. *Id.* at 2646-47 (Blackmun, J., dissenting) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989)).

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

128. *Id.* at 2644-45 (Blackmun, J., dissenting).

to no attorney at all, and could thus contravene the congressional intent that fee-shifting statutes serve as an integral enforcement mechanism in a variety of federal statutes.<sup>129</sup>

While lack of a contingency enhancement to account for the risk of loss may or may not reflect congressional intent, one implication bearing on contingency enhancements is clear from the circuit courts' and the Board's experiences, and is further reflected by the Court in *Dague*. That is, the market approach is the wrong approach either if contingency enhancements are to be the exception, not the rule, or if attorney fee litigation is to remain secondary to the litigation of the merits of cases brought under fee-shifting statutes.

Keeping contingency enhancements the exception rather than the rule, as the Supreme Court has urged repeatedly, was beginning to look like "paradise lost" after *Delaware Valley II*. No matter how cumbersome the procedure, once the parties moving for fee awards mastered the evidentiary procedures, the market approach to enhancement threatened to make risk premiums the rule as the *Delaware Valley II* plurality warned.<sup>130</sup> Classwide enhancements employ a standard multiplier for every case within a class of cases.<sup>131</sup> Virtually all legal communities can show both that the local market treats contingency cases differently by awarding a risk premium to successful contingency cases and that it is more difficult to get attorneys to take contingency cases without a risk enhancement.

If the legislature wants to assure contingency enhancements in the most worthy cases by drafting legislation to award enhancements in all contingency cases, it should do so directly,<sup>132</sup> as the market approach

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129. *Id.* (Blackmun, J., dissenting).

130. *See Delaware Valley II* at 727-31.

131. Commentators have recognized that in *Delaware II* the Supreme Court failed to provide clear and complete guidelines to the lower courts in awarding contingency enhancements and imposed strict burdens of proof on fee applicants. One law review article urged Congress to amend fee-shifting statutes to provide specific methods for computing contingency enhancements and to waive sovereign immunity with regard to interest on reasonable lodestar attorney fees. This would provide prevailing attorneys with a full and complete attorney fee award and the necessary incentive for private enforcement of congressional policies. *See generally*, Arthur J. Lackman, *Attorney's Fee Contingency Enhancements: Toward a Complete Incentive to Litigate Under Federal Fee-Shifting Statutes—Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987), 63 WASH. L. REV. 469, 469-92 (1988) (urging Congress to amend fee-shifting statutes).

132. *Id.* at 2645-46.

is clearly not the best approach. It leads directly to the phenomenon that the Board experienced, and the Court feared in *Dague*: that the attorney fees portion of the case develops into full-blown litigation. Board cases involving requests for contingency enhancements were regularly remanded, sometimes twice remanded,<sup>133</sup> to the regional offices for additional proceedings. The attorney fee phase of the case took on all the attributes of an independent, full-scale adjudication, sometimes, perhaps, dwarfing the merits phase of the case.<sup>134</sup> Indeed, Justice O'Connor's requirement of an explanation of the difference between markets virtually compelled the development of expert economic evidence for the first case in any market and all subsequent cases seeking to change the contingency enhancement standard set by the first case.<sup>135</sup> The Third Circuit in *Blum v. Witco*<sup>136</sup> foresaw this development and articulated in dicta that the market approach raises the possibility that proof of contingency enhancements might require the moving party's presentation of expert testimony from someone familiar with the economics of the legal profession or an expert economist, and perhaps the participation of interveners or amici.<sup>137</sup>

If there is consensus that the award of a lodestar fee alone is insufficient, drafters of legislation can avoid the problems associated with the market approach by determining how much risk they wish to encourage and by setting a contingency enhancement percentage accordingly. There is no reason to spend scarce judicial resources litigating market contingency enhancement percentages by market location for an artificial market.

However, if there is consensus that a standard for awarding contingency enhancement is desired in fewer than all federal fee-shifting contingency cases, thereby reserving enhancement for the "exceptional" case, better alternatives than the market approach exist. For example, the Board and courts have effectively used risk assessment of each particular case to reserve contingency enhancements as the exception.<sup>138</sup> Unfortunately, this too has the downside of possibly requiring

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133. See, e.g., *Lizut v. Department of the Navy*, 51 M.S.P.R. 549 (1991); *Lizut v. Department of the Navy*, 42 M.S.P.R. 3, 9-10 (1989).

134. See *Jones v. Department of the Navy*, 51 M.S.P.R. 542 (1991); *Wilkins v. Department of the Navy*, 51 M.S.P.R. 290 (1991); *Lizut*, 51 M.S.P.R. 549.

135. As markets may be relatively small, many states consist of hundreds of markets. Additionally, any attempt to change a contingency enhancement percentage, once set, would require extensive litigation.

136. 829 F.2d 367.

137. *Id.* at 380.

138. See, e.g., *Kling v. Department of Justice*, 2 M.S.P.R. 464, 473 (1980). Further, review of many circuit court decisions which have attempted to follow the admonition of the *Delaware Valley II* plurality to reserve contingency enhancements for

extensive additional evidence. The comparative ease of adjudicating requests for contingency enhancements in early Board cases, which incorporated the risk of nonpayment in the individual case as a factor, contrasted sharply with the difficulty of adjudicating such cases under a classwide analysis. Risk analysis is intrinsic to a particular case, while the market approach is extrinsic, hence the need for additional fact finding under the market approach. This contrast resonated the point made by the District of Columbia Circuit in *King v. Palmer*,<sup>139</sup> and ultimately by the Supreme Court in *Dague*: that special difficulties ensue from removing risk of loss as a factor in determining whether to award a contingency enhancement.<sup>140</sup>

Risk assessment has the drawback, however, of allowing greater reward to cases that may not effect the intent of the legislation underlying the fee-shifting statutory provision. Risk assessment may allow greater reward to parties litigating cases which present issues that the legislation was not intended primarily to remedy, but which may fit within the broadest reading of the statute. Risk assessment also increases the probability that counsel who, on a contingency basis, represent plaintiffs who bring the most worthy cases, i.e., the most likely to prevail, will not receive a contingency enhancement.<sup>141</sup>

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exceptional circumstances reveals no definition of exceptional cases other than the vagueness of "we will know it when we see it," and possibly leads to the result, opposite to that of Justice O'Connor's opinion, that contingency enhancements will never be awarded. See *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir. 1991); *Smith v. Freeman*, 921 F.2d 1120 (10th Cir. 1990); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987). In light of this, if legislation is drafted to assure the award of contingency enhancements and to reserve them as the exception, the law should indicate what kind of circumstances would be exceptional.

139. 950 F.2d 771 (D.C. Cir. 1991).

140. See *City of Burlington v. Dague*, 112 S. Ct. 2638, 2642-43 (1992); *King*, 950 F.2d at 780.

141. Absent legislative intervention, practicing attorneys could use at least two approaches to effect the intent of Congress to encourage attorneys to represent clients with claims arising under fee-shifting statutes by being retained on a contingency basis, and to receive full compensation without enhancing the lodestar. Attorneys could negotiate a premium from their clients, in addition to the lodestar, if the attorney is successful. The Supreme Court has stated that "depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further the general purpose of enabling such plaintiffs to secure competent counsel." See *Venegas v. Mitchell*, 495 U.S. 82, 89-90 (1990). Also, attorneys could draft retainer agreements charging contingency clients an hourly rate that reflects the rate counsel commands in his contingency practice, and seek fee awards at that hourly rate. This rate is usually higher than that set for clients who



## VII. CONCLUSION

Ultimately, the Board's and circuit courts' contingency fee case experiences furnished a body of evidence showing that the Supreme Court's clarification of its position on awarding contingency enhancements in *Dague* was timely, if not overdue. These experiences also provide evidence of the pitfalls of the market approach as a component of reasonable attorney fees under federal fee-shifting statutes.

In our view, if legislation is drafted to assure that fee-shifting statutes provide for enhancing the lodestar attorney fee award in all cases where counsel is retained under a contingency agreement, it should take a straightforward approach to assure a fully compensatory fee. Setting a particular percentage of enhancement for all contingency fee cases under federal fee-shifting statutes or paying interest on fees as they accrue would reflect the market as effectively as, and certainly more efficiently than, the market approach. If awarding enhancements in fewer than all cases is the preferred legislative solution, using a risk analysis would certainly be preferable to the market approach, although it too has its problems.

Experience shows that with a market approach to contingency enhancements, courts, administrative adjudicators, and practicing attorneys waste valuable public and private resources determining what is "reasonable." These are resources that, as pressure increases to reduce federal expenditures while increasing public service, can be better spent on other things than litigating a reasonable fee.

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pay as work is done. This alternative, however, could involve proof problems such as those involved in proving a fee under the market approach.