SUPREME COURT OF THE UNITED STATES

No. 91–810

CITY OF BURLINGTON, PETITIONER *v.* ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 24, 1992]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

In language typical of most federal fee-shifting provisions, the statutes involved in this case authorize courts to award the prevailing party a "reasonable" attorney's fee.[1] Two principles, in my view, require the conclusion that the "enhanced" fee awarded to respondents was reasonable. First, this Court consistently has recognized that a "reasonable" fee is to be a "fully compensatory fee," *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983), and is to be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri* v. *Jenkins*, 491 U. S. 274, 286 (1989). Second, it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome,[2] and relevant professional standards long have recognized that this practice is reasonable.[3]

The Court does not deny these principles. It simply refuses to draw the conclusion that follows ineluctably: If a statutory fee consistent with market practices is "reasonable," and if in the private market

[1]See 33 U. S. C. §1365(d) (Clean Water Act); 42 U. S. C. §6972(e) (Solid Waste Disposal Act).

[2]See, *e.g.,* R. Posner, Economic Analysis of Law §21.9, pp. 534–535 (3rd ed. 1986).

[3]See Canons of Ethics §12, 33 A. B. A. Rep. 575, 578 (1908); Model Code of Professional Responsibility, DR 2–106(B)(8) (1980); ABA Model Rules of Professional Conduct Rule 1.5(a)(8) (1992).

an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable. The Court's decision to the contrary violates the principles we have applied consistently in prior cases and will seriously weaken the enforcement of those statutes for which Congress has authorized fee awards—notably, many of our Nation's civil rights laws and environmental laws.

Congress' purpose in adopting fee-shifting provisions was to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel. See S. Rep. No. 94–1011, p. 6 (1976). In particular, federal fee-shifting provisions have been designed to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys. See H. R. Rep. No. 94–1558, p. 1 (1976); S. Rep. No. 94–1011, p. 2 (1976). Second, many of the statutes to which Congress attached fee-shifting provisions typically will generate either no damages or only small recoveries; accordingly, plaintiffs bringing cases under these statutes cannot offer attorneys a share of a recovery sufficient to justify a standard contingent fee arrangement. See *Pennsylvania* v. *Delaware Valley Citizens*' *Council for Clean Air* (“*Delaware Valley II*”), 483 U. S. 711, 749 (1987) (dissenting opinion); H. R. Rep. No. 94–1558, p. 9 (1976). The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers—who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation

—and public interest lawyers who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found. See *Delaware Valley II*, 483 U. S., at 742–743 (dissenting opinion).

In many cases brought under federal statutes that authorize fee-shifting, plaintiffs will be unable to ensure that their attorneys will be compensated for the risk that they might not prevail. This will be true in precisely those situations targeted by the fee-shifting statutes—where plaintiffs lack sufficient funds to hire an attorney on a win-or-lose basis and where potential damage awards are insufficient to justify a standard contingent fee arrangement. In these situations, unless the fee-shifting statutes are construed to compensate attorneys for the risk of nonpayment associated with loss, the expected return from cases brought under federal fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation. Prudent counsel, under these conditions, would tend to avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed. This will be true even if the fee-bearing claim is more likely meritorious than the competing private claim.

In *Delaware Valley II*, five Justices of this Court concluded that for these reasons the broad statutory term "reasonable attorney's fee" must be construed to permit, in some circumstances, compensation above the hourly win-or-lose rate generally borrowed to compute the lodestar fee. See 483 U. S., at 731, 732–733 (O'CONNOR, J., concurring in part and concurring in the judgment); *id.*, at 735 (dissenting opinion). Together with the three Justices who joined my dissenting opinion in that case, I would have allowed enhancement where, and to the extent that, the attorney's compensation is contingent upon prevailing and receiving a statutory award. I indicated that if, by contrast, the attorney and client have been able to mitigate the risk of nonpayment—either in full, by agreeing to win-or-lose compensation or to a contingent share of a substantial damage

recovery, or in part, by arranging for partial payment —then to that extent enhancement should be unavailable. *Id.*, at 748–749. I made clear that the "risk" for which enhancement might be available is not the particular factual and legal riskiness of an individual case, but the risk of nonpayment associated with contingent cases considered as a class. *Id.*, at 745–747, 752. Congress, I concluded, did not intend to prohibit district courts from considering contingency in calculating a "reasonable" attorney's fee.[4]

JUSTICE O'CONNOR's concurring opinion agreed that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee," *id.*, at 731, and that "compensation for contingency must be based on the difference in market treatment of

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[4]A number of bills introduced in Congress would have done just this, by prohibiting "bonuses and multipliers" where a suit is against the United States, a State, or a local government. These bills failed to receive congressional approval. See *Delaware Valley II*, 483 U. S., at 739, n. 3 (dissenting opinion).

Moreover, in some instances Congress explicitly has prohibited enhancements, as in the 1986 amendments to the Education of the Handicapped Act. See 20 U. S. C. §1415(e)(4)(C) ("[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection"). Congress' express prohibition on enhancement in this statute suggests that it did not understand the standard fee-shifting language used elsewhere to bar enhancement. Cf. *West Virginia University Hospitals, Inc.* v. *Casey*, ___ U. S. ___, ___-___ [111 S. Ct. 1138, 1141–1143] (1991) (relying, in part, on express authorization of expert-witness fees in subsequently passed fee-shifting statutes to infer that such fees could not have been included in unsupplemented references to "attorney's fees").

contingent fee cases *as a class*, rather than on an assessment of the `riskiness' of any particular case" (emphasis in original). *Ibid.* As I understand her opinion, JUSTICE O'CONNOR further agreed that a court considering an enhancement must determine whether and to what extent the attorney's compensation was contingent, as well as whether and to what extent that contingency was, or could have been, mitigated. Her concurrence added, however, an additional inquiry designed to make the market-based approach "not merely justifiable in theory but also objective and nonarbitrary in practice." *Id.*, at 732. She suggested two additional "constraints on a court's discretion" in determining whether, and how much, enhancement is warranted. First, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market," and varying rates of enhancement among markets must be justifiable by reference to real differences in those markets. *Id.*, at 733. Second, the applicant bears the burden of demonstrating that without an adjustment for risk "the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market" (internal quotations omitted). *Ibid.*

After criticizing at some length an approach it admits respondents and their *amici* do not advocate, see *ante*, at 5–6, and after rejecting the approach of the *Delaware Valley II* concurrence, see *ante*, at 6–7, the Court states that it "see[s] a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue." *Ante*, at 7. I do not find any of these arguments persuasive.

The Court argues, first, that "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases" and uses the cases

that were successful to subsidize those that were not. *Ante*, at 7–8. "To award a contingency enhancement under a fee-shifting statute," the Court concludes, would "in effect" contravene the prevailing-party limitation, by allowing the attorney to recover fees for cases in which his client does not prevail. *Ante*, at 8. What the words "in effect" conceal, however, is the Court's inattention to the language of the statutes: The provisions at issue in this case, like fee-shifting provisions generally, authorize fee awards to prevailing *parties*, not their attorneys. See 33 U. S. C. §1365(d); 42 U. S. C. §6972(e); see also *Venegas* v. *Mitchell*, 495 U. S. 82, 87 (1990). Respondents simply do not advocate awarding fees to any party who has not prevailed. Moreover, the Court's reliance on the "prevailing party" limitation is somewhat misleading: the Court's real objection to contingency enhancement is that the *amount* of an enhanced award would be excessive, not that parties receiving enhanced fee awards are not prevailing parties *entitled* to an award. In prior cases the Court has been careful to distinguish between these two issues. See, *e.g., Hensley* v. *Eckerhart*, 461 U. S., at 433 (the "prevailing party" determination only "brings the plaintiff . . . across the statutory threshold. It remains for the district court to determine what fee is `reasonable.'").

Second, the Court suggests that "both before and since *Delaware Valley II*, `we have generally turned away from the contingent-fee model'—which would make the fee award a percentage of the value of the relief awarded in the primary action—`to the lodestar model.'" *Ante*, at 8, quoting *Venegas* v. *Mitchell*, 495 U. S., at 87. This argument simply plays on two meanings of "contingency." Most assuredly, respondents—who received no damages for their fee-bearing claims—do not advocate "mak[ing] the fee award a percentage" of that amount. Rather, they argue that the *lodestar* figure must be enhanced

because their attorneys' compensation was contingent on prevailing, and because their attorneys could not otherwise be compensated for assuming the risk of nonpayment.

Third, the Court suggests that allowing for contingency enhancement "would make the setting of fees more complex and arbitrary" and would likely lead to "burdensome satellite litigation" that this Court has said should be avoided. *Ante*, at 9. The present case is an odd one in which to make this point: the issue of enhancement hardly occupied center stage in the fees portion of this litigation, and it became a time-consuming matter only after the Court granted certiorari, limited to this question alone.[5] Moreover, if JUSTICE O'CONNOR's standard were adopted, the matter of the amount by which fees should be increased would quickly become settled in the various district courts and courts of appeals for the different kinds of federal litigation. And in any event, speculation that enhancement determinations would be "burdensome" does not speak to the issue whether they are required by the fee-shifting statutes.

The final objection to be considered is the Court's contention that any approach that treats contingent-fee cases as a class is doomed to failure. The Court's

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[5]It is fair to say that petitioner's attention was directed almost exclusively toward the merits issues, both in the lower courts and in its petition for certiorari. While petitioner sharply contested respondents' entitlement to an award and objected to the amount of the lodestar, its opposition to enhancement occupies only a single page of its memorandum in opposition to the motion for fees and costs. See App. 224–225. Only a little more than one page of the 30–page petition for certiorari is devoted to the issue of contingency enhancement. See Pet. for Cert. 25–27.

argument on this score has two parts. First, the Court opines that "for a very large proportion of contingency-fee cases"—cases in which only equitable relief is sought—"there is no `market treatment,'" except insofar as Congress has created an "artificial" market with the fee-shifting statutes themselves. It is circular, the Court contends, to "loo[k] to *that* `market' for the meaning of fee-shifting." *Ante*, at 6–7. And even leaving that difficulty aside, the Court continues, the real "risk" to which lawyers respond is the riskiness of particular cases. Because under a class-based contingency enhancement system the same enhancement will be awarded whether the chance of prevailing was 80% or 20%, "*all cases* having above-class-average chance of success will be overcompensated" (emphasis in original). *Ante*, at 7.

Both parts of this argument are mistaken. The circularity objection overlooks the fact that even under the Court's unenhanced lodestar approach, the district court must find a relevant private market from which to select a fee. The Court offers no reason why this market disappears only when the inquiry turns to enhancement. The second part of the Court's argument is mistaken so far as it assumes the only relevant incentive to which attorneys respond is the risk of losing particular cases. As explained above, a proper system of contingency enhancement addresses a different kind of incentive: the common incentive of all lawyers to avoid *any* fee-bearing claim in which the plaintiff cannot guarantee the lawyer's compensation if he does not prevail. Because, as the Court observes, "no claim has a 100% chance of success," *ante*, at 5, *any* such case under a pure lodestar system will offer a lower prospective return per hour than one in which the lawyer will be paid at the same lodestar rate, win or lose. Even the *least* meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be

economically preferable to the *most* meritorious fee-bearing claim in which the attorney will be paid only if he prevails, so long as the cases require the same amount of time. Yet as noted above, this latter kind of case—in which potential plaintiffs can neither afford to hire attorneys on a straight hourly basis nor offer a percentage of a substantial damage recovery—is exactly the kind of case for which the fee-shifting statutes were designed.

Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal statutes—most notably, civil rights and environmental statutes. The *amicus* briefs filed in this case make clear that we can expect many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel.[6] Today's decision weakens the protections we afford important federal rights.

I dissent.

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[6]See Brief for the Lawyers' Committee for Civil Rights Under Law *et al.* as *Amicus Curiae* 16–22; Brief for the Alabama Employment Lawyers Association *et al.* as *Amicus Curiae* 12–13.