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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 SCALIA delivered the opinion of the Court.

This case presents the question whether a court, in determining an award of reasonable attorney's fees under §7002(e) of the Solid Waste Disposal Act (SWDA), 90 Stat. 2826, as amended, 42 U. S. C. §6972(e), or §505(d) of the Federal Water Pollution Control Act (Clean Water Act (CWA)), 86 Stat. 889, as amended, 33 U. S. C. §1365(d), may enhance the fee award above the "lodestar" amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services. Although different fee-shifting statutes are involved, the question is essentially identical to the one we addressed, but did not resolve, in *Pennsylvania* v. *Delaware Valley Citizens*' *Council for Clean Air*, 483 U. S. 711 (1987) (*Delaware Valley II*).

Respondent Dague (whom we will refer to in place of all the respondents) owns land in Vermont adjacent to a landfill that was owned and operated by petitioner City of Burlington. Represented by attorneys retained on a contingent-fee basis, he sued Burlington over its operation of the landfill. The District Court ruled, *inter alia*, that Burlington had violated provisions of the SWDA and the CWA, and ordered Burlington to close the landfill by January 1, 1990. It also determined that Dague was a

“substantially prevailing party” entitled to an award of attorney's fees under the Acts, see 42 U. S. C. §6972(e); 33 U. S. C. §1365(d). 732 F. Supp. 458 (Vt. 1989).

In calculating the attorney's fees award, the District Court first found reasonable the figures advanced by Dague for his attorneys' hourly rates and for the number of hours expended by them, producing a resulting "lodestar" attorney's fee of $198,027.50. (What our cases have termed the "lodestar" is "the product of reasonable hours times a reasonable rate," *Pennsylvania* v. *Delaware Valley Citizens*' *Council for Clean Air*, 478 U. S. 546, 565 (1986) (*Delaware Valley I*).) Addressing Dague's request for a contingency enhancement, the court looked to Circuit precedent, which provided that "`the rationale that should guide the court's discretion is whether "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts."'" (Quoting *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F. 2d 295, 298 (CA2 1987)). Following this guidance, the court declared that Dague's "risk of not prevailing was substantial" and that "absent an opportunity for enhancement, [Dague] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." It concluded that "a 25% enhancement is appropriate, but anything more would be a windfall to the attorneys." It therefore enhanced the lodestar amount by 25%— $49,506.87.

The Court of Appeals affirmed in all respects. Reviewing the various opinions in *Delaware Valley II*, the court concluded that the issue whether and when a contingency enhancement is warranted remained open, and expressly disagreed with the position taken by some Courts of Appeals that the concurring opinion in *Delaware Valley II* was controlling. The court stated that the District Court had correctly relied on Circuit precedent, and, holding that the District Court's findings were not clearly erroneous, it upheld the 25% contingency enhancement. 935 F. 2d 1343, 1359–1360 (CA2 1991). We granted certiorari

only with respect to the propriety of the contingency enhancement. 502 U. S. —— (1992).

We first provide some background to the issue before us. Fees for legal services in litigation may be either “certain” or “contingent” (or some hybrid of the two). A fee is certain if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result's being obtained. Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses. Under this arrangement, the attorney bears a contingent risk of nonpayment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%.

In *Delaware Valley II*, we reversed a judgment that had affirmed enhancement of a fee award to reflect the contingent risk of nonpayment. In the process, we addressed whether the typical federal fee-shifting statute (there, §304(d) of the Clean Air Act, 42 U. S. C. §7604(d)) permits an attorney's fees award to be enhanced on account of contingency. In the principal opinion, JUSTICE WHITE, joined on this point by three other Justices, determined that such enhancement is not permitted. 483 U. S., at 723–727. JUSTICE O'CONNOR, in an opinion concurring in part and concurring in the judgment, concluded that no enhancement for contingency 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,” *id.*, at 733 (internal quotations omitted), and that any enhancement “must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the `riskiness' of any particular case,” *id.*, at 731 (emphasis in original). JUSTICE BLACKMUN's dissenting opinion, joined by three other Justices,

concluded that enhancement for contingency is always statutorily required. *Id.*, at 737–742, 754.

We turn again to this same issue.

Section 7002(e) of the SWDA and Section 505(d) of the CWA authorize a court to "award costs of litigation (including *reasonable attorney* . . . *fees*)" to a "prevailing or substantially prevailing party." 42 U. S. C. §6972(e) (emphasis added); 33 U. S. C. §1365(d) (emphasis added). This language is similar to that of many other federal fee-shifting statutes, see, *e.g.*, 42 U. S. C. §§1988, 2000e-5(k), 7604(d); our case law construing what is a "reasonable" fee applies uniformly to all of them. *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758, n. 2 (1989).

The "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a "strong presumption" that the lodestar represents the "reasonable" fee, *Delaware Valley I*, *supra*, at 565, and have placed upon the fee applicant who seeks more than that the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." *Blum* v. *Stenson*, 465 U. S. 886, 898 (1984) (emphasis added). The Court of Appeals held, and Dague argues here, that a "reasonable" fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment. Fee-shifting statutes should be construed, he contends, to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates. Petitioner Burlington argues, by contrast, that the lodestar fee may not be enhanced for contingency.

We note at the outset that an enhancement for contingency would likely duplicate in substantial part

factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. *Blum*, *supra*, at 898–899. Taking account of it again through lodestar enhancement amounts to double-counting. *Delaware Valley II*, 483 U. S., at 726–727 (plurality opinion).

The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that *always* exists (no claim has a 100% chance of success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases. See *id.*, at 740 (BLACKMUN, J., dissenting). Moreover, the consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely

objective of the “reasonable fees” provisions. “These statutes were not designed as a form of economic relief to improve the financial lot of lawyers.” *Delaware Valley I*, 478 U. S., at 565.

Instead of enhancement based upon the contingency risk posed by each case, Dague urges that we adopt the approach set forth in the *Delaware Valley II* concurrence. We decline to do so, first and foremost because we do not see how it can intelligibly be applied. On the one hand, it would require the party seeking contingency enhancement to “establish that without the adjustment for risk [he] `would have faced substantial difficulties in finding counsel in the local or other relevant market.'” 483 U. S., at 733. On the other hand, it would forbid enhancement based “on an assessment of the `riskiness' of any particular case.” *Id.*, at 731; see *id.*, at 734 (no enhancement “based on `legal' risks or risks peculiar to the case”). But since the predominant reason that a contingent-fee claimant has difficulty finding counsel in any legal market where the winner's attorney's fees will be paid by the loser is that attorneys view his case as too risky (*i. e.*, too unlikely to succeed), these two propositions, as a practical matter, collide. See *King* v. *Palmer*, 292 U. S. App. D. C. 362, 371, 950 F. 2d 771, 780 (1991) (en banc), cert. pending *sub nom. King* v. *Ridley*, No. 91–1370.

A second difficulty with the approach taken by the concurrence in *Delaware Valley II* is that it would base the contingency enhancement on “the difference in market treatment of contingent fee cases *as a class*.” 483 U. S., at 731 (emphasis in original). To begin with, for a very large proportion of contingency-fee cases—those seeking not monetary damages but injunctive or other equitable relief—there is no “market treatment.” Such cases scarcely exist, except to the extent Congress has created an artificial “market” for them by fee-shifting—and looking to

that “market” for the meaning of fee-shifting is obviously circular. Our decrees would follow the “market,” which in turn is based on our decrees. See *King* v. *Palmer*, 285 U. S. App. D. C. 68, 76, 906 F. 2d 762, 770 (1990) (Williams, J., concurring) (“I see the judicial judgment as defining the market, not vice versa”), vacated, 292 U. S. App. D. C. 362, 950 F. 2d 771 (1991), cert. pending *sub nom. King* v. *Ridley*, No. 91–1370. But even apart from that difficulty, any approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass, cannot possibly achieve the supposed goal of mirroring market incentives. As discussed above, the contingent risk of a case (and hence the difficulty of getting contingent-fee lawyers to take it) depends principally upon its particular merits. Contingency enhancement calculated on *any* class-wide basis, therefore, guarantees *at best* (leaving aside the double-counting problem described earlier) that those cases within the class that have the class-average chance of success will be compensated according to what the “market” requires to produce the services, and that *all cases* having above-class-average chance of success will be overcompensated.

Looking beyond the *Delaware Valley II* concurrence's approach, we perceive no other basis, fairly derivable from the fee-shifting statutes, by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases. And we see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), so should it bar a prevailing plaintiff from recovering for the risk of loss. See *Delaware Valley II*,

supra, at 719–720, 724–725 (principal opinion). An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail.

Second, 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[1]—“to the lodestar model.” *Venegas* v. *Mitchell*, 495 U. S. 82, 87 (1990). We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. See, *e.g.*, Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may “give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation”). For example, in *Blanchard* v. *Bergeron*, 489 U. S. 87 (1989), we held that the lodestar governed, even though it produced a fee that substantially exceeded the amount provided in the contingent-fee agreement between plaintiff and his counsel (which was self-evidently an amount

[1]Contrary to JUSTICE BLACKMUN's understanding, *post*, at 6, there is no reason in theory why the contingent-fee model could not apply to relief other than damages; where injunctive relief is obtained, for example, the fee award would simply be a percentage of the value of the injunctive relief. There would be, to be sure, severe problems of administration in determining the value of injunctive relief, but such problems simply highlight why we have rejected the contingent-fee model in favor of the lodestar model.

adequate to attract the needed legal services). *Id.*, at 96. Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contingency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

And finally, the interest in ready administrability that has underlain our adoption of the lodestar approach, see, *e.g.*, *Hensley*, *supra*, at 433, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation," *id.*, at 437), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable. It is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect. See *Delaware Valley I*, 478 U. S., at 565.

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Adopting the position set forth in JUSTICE WHITE's opinion in *Delaware Valley II*, 483 U. S., at 715–727, we hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue. We reverse the Court of Appeals' judgment insofar as it affirmed the 25% enhancement of the lodestar.

It is so ordered.