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Federal fee-shifting statutes generally allow trial courts to award “reasonable” attorney's fees to prevailing parties in order to promote private enforcement of Congressional statutory directives. The starting point for the computation of fee awards under the fee-shifting statutes is the “lodestar” amount. The “lodestar” amount is defined as the reasonable number of hours spent by the attorney on the case multiplied by a reasonable hourly rate. Trial courts, in their discretion, have then enhanced the lodestar amount based on a variety of factors, including the quality of representation, delay in receiving payment, and contingency. Contingency is defined as the risk at the outset of the litigation that the prevailing attorney will receive no fee.

The inconsistent application of contingency enhancements by the federal courts led the Supreme Court to consider the allowance of such enhancements in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) ("Delaware Valley II"). In a five-to-four plurality decision, the Court reversed an award of a contingency enhancement to a lodestar fee. A different majority of five Justices concluded that Congress did not intend to foreclose the allowance of such enhancements in enacting fee-shifting statutes. Although these five Justices agreed on a "market" theory of compensating for contingency, they did not adopt a specific method of computing contingency enhancements.

This Note discusses how lower courts can apply the opinions in Delaware Valley II to allow contingency enhancements to lodestar fees consistent with Congress' intent in enacting fee-shifting statutes. Because lower courts may interpret Delaware Valley II as effectively eliminating contingency enhancements in all but exceptional cases, this Note suggests that Congress should amend the fee-shifting statutes to allow such enhancements.

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1. There are currently over 100 federal fee-shifting statutes. For a list of such statutes, see Marek v. Chesny, 473 U.S. 1, 44–51 (1985) (Brennan, J., dissenting).
I. COMPUTATION OF ATTORNEY'S FEE AWARDS

A. The Purposes of Fee-Shifting Statutes

Governmental enforcement of some federal laws is sometimes insufficient to carry out Congress' objectives.3 The major purpose of fee-shifting statutes is to provide an incentive for the private enforcement of Congressional statutory policy.4 The statutory award of attorney's fees allows parties bringing actions to act both on their own behalf and on the public's behalf in promoting Congressional policy.5 However, private enforcement of statutes is unlikely if aggrieved citizens lack financial resources to pay lawyers for their services.6 Fee awards are an integral part of the remedies available to ensure compliance with various Congressional statutes.7

3. This situation arises for at least three reasons. First, even when an agency of the government has enforcement responsibility, its authority and resources may be limited. HOUSE COMM. ON THE JUDICIARY, CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1. Second, in many cases where laws are violated, private citizens must initiate court action to correct the violation of the law. Id. Third, many government agencies are the defendants in suits enforcing the statutory rights, so they “may follow a restrictive approach to public interest cases.” R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 128 (1980).

4. SENATE COMM. ON THE JUDICIARY, CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT, S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5910 (“fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain”).

This Note makes frequent reference to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), and the Committee reports thereunder. See S. REP. NO. 1011, supra; H.R. REP. NO. 1558, supra note 3. The Supreme Court has applied the legislative history and case law governing 42 U.S.C. § 1988 in interpreting the provisions of other fee-shifting statutes, including the Clean Air Act attorney's fee provision involved in Delaware Valley II. Delaware Valley II, 107 S. Ct. at 3080 n.1. Therefore, the Supreme Court's holdings on the computation of attorney's fee awards have been interpreted to apply to fee-shifting statutes in general. See Blum v. Witco Chem. Corp., 829 F.2d 367, 379 n.10 (3d Cir. 1987); Spell v. McDaniel, 824 F.2d 1380, 1404 n.22 (4th Cir. 1987).

5. S. REP. NO. 1011, supra note 4, at 3.

6. Id. at 2. In addition, contingent fee arrangements are not useful when the only available relief is an injunction or declaratory judgment. See Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968), quoted in S. REP. NO. 1011, supra note 4, at 3.

7. S. REP. NO. 1011, supra note 4, at 5. The fee-shifting statutes also serve other purposes. Equity and fairness are achieved because the cost of enforcement is charged to the violators of the statutory rights rather than the persons seeking to preserve their rights. Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 653–57; R. Aronson, supra note 3, at 128. An award of attorney's fees has the effect of making the litigant “financially whole,” Rowe, supra, at 653, 657–59, and the judicial system is benefitted by assuring greater equality in the adversary process. R. Aronson, supra note 3, at 128. Fee-shifting statutes provide a method of financing public interest law which enables a lawyer to represent individual clients rather than a “source of funds.” Id. at 129. Finally, some fee-shifting statutes are intended to discourage unwarranted litigation by punishing abuses of the judicial process. M.
Attorney's Fee Contingency Enhancements

B. Approaches to Computation of Attorney's Fee Awards

Under most fee-shifting statutes, an award of attorney's fees must be "reasonable." A reasonable attorney's fee is one that is "adequate to attract competent counsel, but which do[es] not produce windfalls to attorneys." Three approaches have been used by the courts to compute awards under the fee-shifting statutes.

1. The "Lodestar" Approach

The "lodestar" method is a market-focused, objective approach to computing fee awards under fee-shifting statutes. Under this method, the court determines the basic amount of the attorney's fee award by multiplying the reasonable number of hours worked on the litigation by the reasonable market-based hourly rates for such work. After its creation by the Third Circuit in 1973, the lodestar approach has become almost universally used as the starting point by courts in computing a reasonable attorney's fee award.

2. The "Subjective Factors" Approach

Courts using subjective criteria in computing the amount of attorney's fee awards weigh several factors in computing a reasonable fee award. The most commonly employed set of subjective factors is contained in the Fifth Circuit's 1974 decision, Johnson v. Georgia Highway Express, Inc. The application by a trial judge of this list of often overlapping subjective factors in computing attorney's fee awards has been criticized for producing divergent, unpredictable and unjust

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8. See, e.g., 42 U.S.C. § 1988 ("the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs."); Clean Air Act § 304(d), 42 U.S.C. § 7604(d) ("The court ... may award costs of litigation (including reasonable attorney and expert witness fees) to any party ... ").
9. S. REP. No. 1011, supra note 4, at 6.
13. 488 F.2d 714 (5th Cir. 1974). The factors cited in Johnson are the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases. Id. at 717-19.
awards,\textsuperscript{14} being unwieldy to apply,\textsuperscript{15} and making appellate review difficult.\textsuperscript{16}

3. \textit{The Hybrid Approach}

The Senate Judiciary Committee, in drafting the report in support of the Civil Rights Attorney's Fees Awards Act of 1976, could have advocated either the subjective factors or the lodestar method of computing fee awards. The Committee Report stated that the Johnson factors were appropriate standards to be used in computing reasonable fee awards.\textsuperscript{17} At the same time, the Report implicitly accepted the lodestar approach by requiring compensation "for all time reasonably expended on the matter."\textsuperscript{18} Indeed, in its 1983 decision in \textit{Hensley v. Eckerhart},\textsuperscript{19} the Supreme Court interpreted Congress' language to require that the computation of the lodestar amount be the starting point in determining a reasonable fee award,\textsuperscript{20} increased or decreased by considering the Johnson factors not subsumed within the initial lodestar computation.\textsuperscript{21} The approach which has emerged as the predominant method of computing fee awards combines the use of the Johnson subjective factors and the lodestar approach.\textsuperscript{22}

The Court more completely defined the hybrid approach to computing fee awards in \textit{Blum v. Stenson}.\textsuperscript{23} The Court held that market-based hourly rates, not rates based on the actual cost of providing legal services in a particular case, should be used in setting the lodestar amount.\textsuperscript{24} The Court also indicated that the lodestar amount is presumed to be a reasonable fee under the fee-shifting statutes.\textsuperscript{25} After

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\bibitem{Lindy I} \textit{Lindy I}, 487 F.2d at 167; \textit{M. Derfner & A. Wolf, supra} note 7, at \S 15.03[6]; Dobbs, \textit{Awarding Attorney Fees Against Adversaries: Introducing the Problem}, 1986 DUKE L.J. 435, 465.

\bibitem{Lindy II} \textit{M. Derfner & A. Wolf, supra} note 7, at \S 15.03[5]; Dobbs, \textit{supra} note 14, at 465-66.

\bibitem{Lindy III} \textit{Lindy I}, 487 F.2d at 166; \textit{M. Derfner & A. Wolf, supra} note 7, at \S 15.03[6]; Dobbs, \textit{supra} note 14, at 466.


\bibitem{Hensley} \textit{Id.} (quoting \textit{Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) \S 9444 (C.D. Cal. 1974)}). The lodestar approach is designed to compensate for the time expended by the attorney at market hourly rates. \textit{See supra} text accompanying notes 10-12.

\bibitem{Hensley I} \textit{461 U.S. 424} (1983).

\bibitem{Hensley II} \textit{Id.} at 433.

\bibitem{Hensley III} \textit{Id.} at 434. The Court in \textit{Hensley} did not state which Johnson factors are subsumed within the initial lodestar computation, but did indicate that the "results obtained" was an important factor which would justify adjustment of the original lodestar computation. \textit{Id.}

\bibitem{Blum} \textit{M. Derfner & A. Wolf, supra} note 7, at \S 15.03[4].

\bibitem{Hensley IV} \textit{465 U.S. 886} (1984).

\bibitem{Hensley V} \textit{Id.} at 895.

\bibitem{Hensley VI} \textit{Id.} at 897. Thus, according to the Court's decision in \textit{Blum}, subjective factors such as the quality of representation and the novelty and complexity of the issues are normally reflected in the lodestar amount. \textit{Id.} at 898–99. Contrary to the Court's conclusion in \textit{Hensley}, the "results

472
Attorney's Fee Contingency Enhancements

*Blum*, the *Johnson* factors can be considered in determining the reasonable market-based hourly rate and reasonable number of hours used to compute the lodestar amount. The lodestar amount can be adjusted only when the *Johnson* factors are not reflected in the reasonable number of hours and reasonable market-based hourly rates.

C. Bases for Adjusting Lodestar Fee Amounts

1. Quality of Representation

Courts traditionally increased or decreased lodestar fees based on the unusually high or low quality of the attorney's representation. Because this factor is normally reflected in the market-based hourly rate, the Supreme Court held in *Blum* that an upward adjustment is justified only when the quality of service rendered is superior to that reasonably expected in light of the market-based hourly rates and the success achieved in the litigation is "exceptional." Based on the Court's application of this test, enhancements to the lodestar amount based on quality of representation are rare.

2. Delay in Receiving Payment

The second basis for adjusting the lodestar amount is an enhancement for the lawyer's delay in receiving payment of the attorney's fee. Courts have awarded delay enhancements based on interest (the obtained" factor is generally subsumed within the other *Johnson* factors, so that it should not normally be used as an independent basis for enhancing an otherwise reasonable fee. *Id.* at 900.

26. The authors of one attorney's fee treatise have interpreted *Blum* as accepting the practice of reflecting the *Johnson* subjective criteria in the determination of reasonable market-based hourly rates. M. DERFNER & A. WOLF, *supra* note 7, at 75.03[4]. On the other hand, another commentator described the effect of *Blum* as "a firm position against the *Johnson* factors method of fee calculation." Dobbs, *supra* note 14, at 469. Although Dobbs sees *Blum* as a rejection of the *Johnson* approach, he also recognizes that subjective factors might be used to determine the appropriate market hourly rate. *Id.* at 488. There is not, in a given market, one reasonable hourly rate for an attorney's services. Rather, a variety of rates exists from which to choose. *Id.* at 486-89; *Blum*, 465 U.S. at 899. Therefore, in applying the holding in *Blum*, a trial court judge has some discretion to apply the *Johnson* factors in choosing a market-based hourly rate from the range of possible hourly rates.


30. See, e.g., Daly v. Hill, 790 F.2d 1071, 1081 (4th Cir. 1986); Johnson v. University College, 706 F.2d 1205, 1210-11 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983); *Copeland*, 641 F.2d at 893.
loss of the use of money) and inflation (the loss of the earning power of money). Many courts compensate for both the interest and inflation aspects of delay by using current, as opposed to historic, market-based hourly rates in computing the lodestar amount. The Supreme Court has not explicitly accepted or rejected enhancements to lodestar amounts based on delay.

3. Contingency

The third basis for adjusting the lodestar amount is contingency, defined as the lawyer's risk at the outset of the litigation that no fee will be recovered. Under the typical fee-shifting statutes, attorneys can recover fees only if their clients are successful in the litigation. Consequently, attorneys deciding to take cases with clients under a fee-shifting statute are risking nonpayment for the legal services rendered. The contingency enhancement is an attempt by courts to compensate attorneys for taking such a risk. The enhancement has

31. Enhancement for interest is awarded because attorney's fees are received in contingency cases only after the legal services are rendered, thereby depriving the attorney of the use of the money in the meantime. Copeland, 641 F.2d at 893; Dobbs, supra note 14, at 475.
32. Copeland, 641 F.2d at 893; Dobbs, supra note 14, at 476-77.
33. Dobbs, supra note 14, at 476. See, e.g., Murray v. Weinberger, 741 F.2d 1423, 1433 (D.C. Cir. 1984); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983). “Historic” market-based hourly rates are the rates in effect when the services are rendered. “Current” market-based hourly rates are the rates in effect when a court makes the fee award.
34. The Court has discussed delay enhancements in two recent cases. First, in Library of Congress v. Shaw, 106 S. Ct. 2957 (1986), the Court disallowed the enhancement because it was assessed against the United States in violation of the doctrine of sovereign immunity. See infra notes 117-20 and accompanying text. The Court in Shaw did not base its decision on any theoretical deficiency of awarding delay enhancements to lodestar amounts. Second, a majority of the Justices in Delaware Valley I stated that “[w]e do not suggest ... that adjustments for delay are inconsistent with the typical fee-shifting statute.” Delaware Valley II, 107 S. Ct. 3078, 3082 (1987).
35. Although courts frequently use the terms interchangeably, compensation for “contingency” is separate and distinct from “contingent fee arrangements” typically entered into by attorneys and clients in civil litigation. Blum v. Stenson, 465 U.S. 886, 903 (1984) (Brennan, J., concurring); Copeland, 641 F.2d at 893. In contingent fee cases, the attorney receives an agreed upon percentage of the recovery. The contingency adjustment under fee-shifting statutes is an enhancement to the lodestar figure which is not based on a percentage of recovery. The two concepts are related only in that they both involve the risk of not being paid.
37. When plaintiffs seek monetary damages, attorneys can mitigate the risk of nonpayment by entering into contingent fee arrangements with their clients, even in cases where fees are recoverable under a fee-shifting statute. See Kirchoff v. Flynn, 786 F.2d 320, 328 (7th Cir. 1986) (citing cases from United States courts of appeals which have considered the effect of contingent fee arrangements on awards under fee-shifting statutes).
traditionally been computed by assessing the prevailing party’s likelihood of success at the outset of the litigation.\textsuperscript{39} The issue of whether contingency enhancements are permitted was expressly left open by the Court in \textit{Blum}.\textsuperscript{40} After \textit{Blum}, most federal courts continued to allow enhancements to the lodestar amount based on contingency.\textsuperscript{41}

\section*{II. \textit{PENNSYLVANIA v. DELAWARE VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR (DELAWARE VALLEY II)}}

In \textit{Delaware Valley II}, the Supreme Court determined that, although contingency enhancements to lodestar fee amounts are permitted under fee-shifting statutes, such an enhancement could not be awarded based on the particular facts of the case.

\subsection*{A. History of the Litigation}

In 1977, the Delaware Valley Citizens’ Council for Clean Air ("Citizens’ Council") instituted an action in federal district court to compel Pennsylvania to undertake a vehicle emission inspection and maintenance ("I/M") program as required by the federal Clean Air Act.\textsuperscript{42} In 1978, Pennsylvania, pursuant to a consent decree, agreed to implement the I/M program.\textsuperscript{43} Pennsylvania resisted compliance with the terms of the consent decree for several years thereafter.\textsuperscript{44} The Citizens’ Council accomplished the implementation of the I/M program only following "protracted, bitter, and highly publicized enforcement

\textsuperscript{39} See \textit{Berger}, \textit{Court Awarded Attorneys' Fees: What is "Reasonable"?}, 126 U. PA. L. REV. 281, 326 (1977). Under the traditional "multiplier" approach, the lodestar amount is multiplied by the reciprocal of the probability of success at the outset of the litigation to arrive at the appropriate contingency enhancement. \textit{Id.}

\textsuperscript{40} 465 U.S. at 901 n.17 ("We have no occasion in this case to consider whether the risk of not being the prevailing party in a [42 U.S.C.] § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment.").

\textsuperscript{41} See \textit{Delaware Valley II}, 107 S. Ct. 3078, 3095 n.6 (1987) (Blackmun, J., dissenting) (listing cases from eleven of the thirteen United States courts of appeals which have continued to allow contingency enhancements). Two courts of appeals have rejected contingency as an independent basis for enhancing a fee award after \textit{Blum}. See \textit{McKinnon v. City of Berwyn}, 750 F.2d 1383 (7th Cir. 1984); \textit{Laffey v. Northwest Airlines, Inc.}, 746 F.2d 4 (D.C. Cir., 1984), cert. denied, 472 U.S. 1021 (1985).


\textsuperscript{43} \textit{Id.} at 1416–17.

\textsuperscript{44} \textit{Id.} at 1417–18.
proceedings.” After obtaining relief, the Citizens’ Council petitioned the district court for an award of attorney’s fees under the Clean Air Act.

The district court computed the basic lodestar amount for each of the various phases of the litigation, then doubled the basic lodestar amount pertaining to two phases of the litigation and quadrupled it in a third phase. These enhancements were based on the contingent nature of the case and the quality of the work performed. The Third Circuit affirmed the district court’s computation of fees, and Pennsylvania appealed the award to the Supreme Court.

In Delaware Valley I, the Supreme Court upheld the district court’s computation of the lodestar amount, but reversed its enhancement of the lodestar for the quality of counsels’ performance. The Court concluded that, because the quality of representation is normally reflected in the market-based hourly rate, and because neither the Citizens’ Council presented evidence nor the lower courts made findings that the lodestar amount was unreasonable, the lodestar amount could not be adjusted in this case based on quality of representation. The Court deferred its decision concerning whether the lodestar amount can be enhanced based on contingency until after counsel presented additional arguments to the Court on the issue.

B. The Three Opinions in Delaware Valley II

After rehearing arguments on the case, the Court was unable to agree on a majority opinion. A bare majority of the Justices agreed that the district court erred in augmenting the lodestar amount based

47. Delaware Valley, 581 F. Supp. at 1422–31. The district court had divided the case into nine phases, with each phase relating to a different aspect of the litigation. Id. at 1420.
48. Id. at 1431. The trial court did not indicate how the multiplier amounts were computed, but did state that a multiplier of two was applied “where [the] likelihood of success was least,” and a multiplier of four was applied where “eventual implementation of the I/M program seemed least likely and the phase where plaintiffs’ work was superior.” Id. The district court adjusted the total attorney’s fees from a $82,234 basic lodestar amount to $209,813 after application of the risk/quality multipliers. Delaware Valley, 762 F.2d at 275.
49. Delaware Valley, 762 F.2d at 274–75.
51. Id. at 3099.
52. Id. at 3099–3100.
53. Id. at 3100.
on contingency. Justice White wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Powell and Scalia, stating that Congress did not intend for contingency to be an independent basis for increasing the amount of an otherwise reasonable lodestar fee. Justice Blackmun wrote a dissent, joined by Justices Brennan, Marshall, and Stevens. The dissenting opinion completely rejected the plurality's analysis and found instead that Congress had intended to permit contingency enhancements. The dissenting Justices would have remanded the case to the district court for consideration consistent with its proposal for a new method of enhancement computation, a "market" approach. After the trial court applied the "market" approach, the dissenting Justices would have required it to determine if any extra enhancement was appropriate "because of the significant legal risks apparent at the outset of the litigation and because of the importance of the case."

Justice O'Connor, in a separate opinion, agreed with the plurality that the contingency multiplier awarded should not have been allowed in this case. With the dissent, she argued that Congress intended to permit contingency enhancements when computing a reasonable attorney's fee under the fee-shifting statutes. While she found the dissent's "market" approach theoretically superior to the traditional practice of assessing the probability of success in a particular case, she was unable to determine from the dissenting opinion how the theory could be objectively put into practice.

55. For purposes of this Note, Justice White's opinion in *Delaware Valley II* is referred to as the "plurality opinion."
56. *Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion). The plurality concluded that such enhancements should only be allowed in exceptional cases, and this was not such an exceptional case. Id. at 3088.
57. For purposes of this Note, Justice Blackmun's opinion in *Delaware Valley II* is referred to as the "dissenting opinion."
59. Id. at 3101–02. See also infra notes 76–80 and accompanying text.
60. *Delaware Valley II*, 107 S. Ct. at 3102 (Blackmun, J., dissenting).
61. For purposes of this Note, Justice O'Connor's opinion in *Delaware Valley II* is referred to as the "concurring opinion."
63. Id.
64. Id. at 3090. Justice O'Connor agreed with the plurality opinion that assessment of the likelihood of success in a particular case is subject to severe criticisms. See infra notes 70–75 and accompanying text.
65. *Delaware Valley II*, 107 S. Ct. at 3090 (O'Connor, J., concurring). Justice O'Connor proposed the application of three standards to constrain a trial court's discretion in enhancing a fee based on contingency. First, lower courts should be required to treat their determinations of
C. The Significance of Delaware Valley II to Attorney's Fee Computations

Four principles emerged from the opinions in Delaware Valley II which serve as a guide to lower courts in computing awards under fee-shifting statutes.

1. Contingency Enhancements Permitted

Five Justices (the four dissenting Justices and Justice O'Connor) agreed that Congress intended to permit consideration of contingency enhancements in enacting the fee-shifting statutes. Although the statutes do not expressly provide for them, such enhancements are allowed when necessary to carry out the purpose of the fee-shifting statutes of encouraging private enforcement of statutory rights.

2. Rejection of Traditional Contingency "Multiplier" Approach

Contingency multipliers have traditionally been computed by multiplying the lodestar amount by a factor based on the probability of success at the outset of the litigation. All nine Justices rejected the application of such contingency multipliers to lodestar fees.

Justice White noted that the use of traditional contingency multipliers is flawed for at least four reasons. First, estimating the prevailing party's probability of success at the time the attorney first considered how a particular market compensates for contingency as binding precedent in that market. Id. Second, the fee applicant should bear the burden of proving how the relevant market compensates for risk. Id. Third, courts should never award a contingency enhancement based on an assessment of the risk of loss in a particular case. Id. at 3091. Because these standards were not used by the district court in enhancing the fee, Justice O'Connor agreed with the plurality that the allowance of a contingency enhancement should be reversed in this case. Id. at 3091.

66. Id. at 3089 (O'Connor, J., concurring); id. at 3092-94 (Blackmun, J., dissenting). Justice White's plurality opinion states that Congress did not intend to allow enhancements based on the risk of losing the lawsuit. Id. at 3086 (plurality opinion). However, even after stating that Congress did not intend to allow such enhancements, the plurality opinion allows an enhancement for risk of nonpayment in "exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." Id. at 3088. Thus, even the plurality Justices leave open the possibility of enhancing the lodestar amount based on risk of nonpayment.

67. Id. at 3093 (Blackmun, J., dissenting); H.R. REP. NO. 1558, supra note 3, at 1.

68. See supra note 39 and accompanying text.

69. While the majority of Justices voted to reverse the district court's enhancement, the four dissenting Justices also did not agree with the method used by the trial court to compute the enhancements, and voted to remand the case for redetermination. Delaware Valley II, 107 S. Ct. at 3102 (Blackmun, J., dissenting).
Attorney's Fee Contingency Enhancements

filing the suit is extremely difficult. Such a probability cannot be computed with mathematical precision and its computation requires the use of hindsight by the judge. Second, a court's evaluation of contingency creates a potential conflict of interest between the attorney and client. The prevailing attorney is forced to expose the weaknesses and inconsistencies of the client's case in order to maximize the fee award when the decision on substantive law may be appealed to a higher court. Third, enhancing the fee based on probability of success in a particular case both penalizes losing parties with the strongest cases and subsidizes the prevailing party's attorney for bringing other unsuccessful actions. Fourth, the probability of success cannot be determined with certainty or accuracy. Thus, enhancement computed on this basis is not likely to serve as an incentive for attorneys to represent indigent plaintiffs and tends to make fee litigation protracted and complicated.

3. Acceptance of "Market" Approach to Computing Contingency Enhancements

Justice O'Connor endorsed the four dissenting Justices' "market" approach to computing contingency enhancements. According to

70. Id. at 3084–85 (plurality opinion); Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473, 486 (1980).
71. Delaware Valley II, 107 S. Ct. at 3084 (plurality opinion); Leubsdorf, supra note 70, at 482–83.
72. Delaware Valley II, 107 S. Ct. at 3084 (plurality opinion); Leubsdorf, supra note 70, at 483. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) (a potential conflict of interest exists "if the representation may be materially limited . . . by the lawyer's own interests").
73. Delaware Valley II, 107 S. Ct. at 3085 (plurality opinion); Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 COLUM. L. REV. 346, 375 (1980). As the prevailing party's probability of success decreases, the multiplier amount increases under the traditional multiplier approach. Leubsdorf, supra note 70, at 488. This result has been interpreted as violating the requirement that only prevailing parties are permitted to recover awards under the fee-shifting statutes. Delaware Valley II, 107 S. Ct. at 3086; McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984).
74. Delaware Valley II, 107 S. Ct. at 3085 (plurality opinion); Leubsdorf, supra note 70, at 489.
75. Delaware Valley II, 107 S. Ct. at 3085 (plurality opinion); Leubsdorf, supra note 70, at 496; Comment, Nonpayment Risk Multipliers: Incentives or Windfalls?, 53 U. CHI. L. REV. 1074, 1095 (1986).
76. Delaware Valley II, 107 S. Ct. at 3089 (O'Connor, J., concurring). The dissenting opinion presents a five-step process for implementing its "market" approach. First, the trial court determines whether the case was taken on a contingent basis. Second, the court determines whether the attorneys were able to mitigate the risks of nonpayment. Third, it determines if other economic risks, such as delay and size of the firm, were aggravated by the contingency. Fourth, the court arrives at a contingency enhancement which compensates the attorneys for the risks assumed. Fifth, the court determines whether an extra enhancement is warranted based on
the dissenting opinion, once a court determines that the facts of a particular case justify a contingency enhancement, the proper amount of the enhancement is that which "parallels, as closely as possible, the premium for contingency that exists in prevailing market rates." The "market" approach requires courts to base compensation for contingency "on the difference in market treatment of contingent fee cases as a class." Under the dissent's analysis, an enhancement based on how the market compensates for contingency will not be subject to the criticisms of the traditional contingency multiplier approach because the "market" approach does not require an assessment of the riskiness of a particular case. However, neither the dissenting opinion nor the concurring opinion offers a concrete method of computing the enhancement and implementing the "market" approach.

4. Fee Applicant's Burden of Proof

Justice White's and Justice O'Connor's opinions imposed two burden of proof requirements on fee applicants. First, in order to receive a contingency enhancement, fee applicants must prove that without risk enhancement they "would have faced substantial difficulties in finding counsel in the local or other relevant market." Second, after the court finds that a contingency enhancement is appropriate, the fee applicant has the burden of establishing the amount of the contingency enhancement. Under the "market" approach to computing the enhancement, this requirement places the burden of proving the degree to which the relevant market compensates for contingency on the fee applicant.

III. FEE ENHANCEMENTS AFTER DELAWARE VALLEY II

Although a majority of the Supreme Court agreed that contingency enhancements are permitted under federal fee-shifting statutes, the Court's decision in Delaware Valley II did not present a workable

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77. Id.
78. Id. at 3089 (O'Connor, J., concurring).
79. Id.
80. Id. at 3090.
81. Id. at 3089 (plurality opinion); id. at 3091 (O'Connor, J., concurring). This test is based on an economic assumption that a trial court's attorney's fee award should not exceed the amount necessary to attract competent counsel. Id. at 3089 n.12; Lewis v. Coughlin, 801 F.2d 570, 576 (2d Cir. 1986).
83. Id.
method of computing such enhancements. While a majority of the Court proposed a "market" approach to computing contingency enhancements, no actual market exists from which to compute the enhancement. Based on the Court's adoption of strict burden of proof requirements, many lower courts may conclude that contingency enhancements have been effectively eliminated by the Delaware Valley II decision. Nevertheless, methods of applying the decision do exist. If lower courts fail to permit contingency enhancements in all but exceptional circumstances, Congress should amend the fee-shifting statutes to permit such enhancements so that the fee-shifting statutes achieve the desired incentive effect.

A. Both the Purposes and Legislative History Behind Fee-Shifting Statutes Require Contingency Enhancements

In order to achieve the incentive Congress intended in enacting the fee-shifting statutes, fees must be awarded which are fully competitive with the private market and which attract competent lawyers in private practice to take public interest cases. Unless compensation under fee-shifting statutes is complete, private attorneys will not take public interest cases outside their limited pro bono practices. Furthermore, public interest law firms will be forced to reject many statutory enforcement cases.


85. The House report in support of 42 U.S.C. § 1988 found that private lawyers were refusing to take on civil cases because they could not afford to do so. H.R. Rep. No. 1558, supra note 3, at 3. See also Amicus Curiae Brief of Twelve Small Private Civil Rights Law Firms in Support of Respondents at 6-29, Delaware Valley II (No. 85-5).

The pro bono bar is extremely limited. See Gathercole, Legal Services and the Poor, in Lawyers and the Consumer Interest: Regulating the Market for Legal Services 423 (1982). Although lawyers "should" do pro bono work in jurisdictions which have adopted the American Bar Association's Model Rules of Professional Conduct Rule 6.1 (1983), it is unlikely that this will have a great impact on private attorneys' acceptance of public interest cases, which often take many years and pit attorneys against state and federal governments. For example, the action which is the subject of Delaware Valley II took seven years to complete. Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 581 F. Supp. 1412, 1416-18 (E.D. Pa. 1984), aff'd, 762 F.2d 272 (3d Cir. 1985), aff'd in part, rev'd in part, 106 S. Ct. 3088 (1986), rev'd on other grounds on rehearing, 107 S. Ct. 3078 (1987).

86. Legal service organizations funded by the Legal Services Corporation are already precluded by federal law from taking cases in which an award is available based on a fee-shifting statute. 42 U.S.C. § 2996f(b)(1) (1982). See also Note, Integration of the Legal Aid and Fee-Shifting Exceptions to the American Rule: Proposal for Amending the Legal Services Corporation Act, 5 Rev. of Litigation 157 (1986) (recommending that Congress amend the Legal Services Corporation Act to allow legal aid representation in certain statutory fee cases).
If attorneys must choose between litigating a case in which compensation is regularly received as services are rendered and litigation under a fee-shifting statute where compensation will be received only at the end of the litigation, and then only if their client prevails, most will choose the noncontingent employment unless two items are compensated. First, the attorneys must know they will be compensated for the delay in receiving payment for services rendered. Second, they must know they will be compensated for assuming the risk of nonpayment at the outset of the litigation. Enhancements for delay and contingency ensure that adequate counsel will be attracted to public interest litigation without granting windfalls to prevailing attorneys.

The legislative history of 42 U.S.C. § 1988, which the Court used in analyzing the Clean Air Act fee-shifting provision in Delaware Valley II, buttresses the conclusion that Congress intended to allow contingency enhancements. The Senate Report in support of 42 U.S.C. § 1988 cited three cases which properly applied the Johnson factors. In one of those cases, Stanford Daily v. Zurcher, the court specifically held that the lodestar amount should be increased “to reflect the fact that the attorneys’ compensation . . . was contingent in nature.”

88. Id. at 892; Berger, supra note 39, at 324–25.
89. S. REP. No. 1011, supra note 4, at 6. A properly computed contingency enhancement will not result in a windfall to a prevailing attorney, since these items are not included in the initial lodestar amount.

Justice White, in his plurality opinion in Delaware Valley II, argues that an enhancement for contingency results in a windfall to the prevailing attorney. Delaware Valley II, 107 S. Ct. at 3087 (plurality opinion). According to Justice White, contingency is taken into account in computing the lodestar amount since factors such as “novelty and difficulty of the issues presented” and “the potential for protracted litigation” are considered in computing the reasonable number of hours and reasonable hourly rate. Id. This argument fails because compensation for an attorney’s acceptance of a risk of nonpayment at the outset of litigation is entirely separate and distinct from compensation for overcoming difficulty and other subjective characteristics of the case. The risk assumed by attorneys is that they will not be compensated for any of the hours worked if their client loses. See Amicus Curiae Brief of Twelve Small Private Civil Rights Law Firms in Support of Respondents at 40–41, Delaware Valley II (No. 85-5).

90. See supra note 4.
91. S. REP. No. 1011, supra note 4, at 6. The cases cited in the report are Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483 (W.D.N.C. 1975); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), aff’d, 550 F.2d 464 (9th Cir. 1977), rev’d on other grounds, 436 U.S. 547 (1978); Davis v. County of Los Angeles, 8 Emp. Prac. Dec. (CCH) ¶9444 (C.D. Cal. 1974). “These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.” S. REP. No. 1011, supra note 4, at 6.
92. 64 F.R.D. 680 (N.D. Cal. 1974), aff’d, 550 F.2d 464 (9th Cir. 1977), rev’d on other grounds, 436 U.S. 547 (1978).
93. Id. at 686. For an explanation of the difference between cases which are “contingent in nature” and “contingent fee agreements,” see supra note 35.
The legislative history of 42 U.S.C. § 1988 therefore clearly shows that Congress contemplated contingency enhancements in computing a reasonable fee award.\textsuperscript{94}

\textbf{B. Criticism of Delaware Valley II}

After having first concluded that contingency enhancements are allowed in appropriate circumstances, the Court took steps to eliminate all such enhancements from awards under fee-shifting statutes. It is likely that many lower courts will interpret \textit{Delaware Valley II} as eliminating contingency enhancements in all but exceptional cases based on both the difficulty in applying the Court's "market" approach and the strict burden of proof requirements imposed on fee applicants.

\textit{1. The "Market" Approach}

Under the "market" approach to computing contingency enhancements, adopted by the dissenting Justices and Justice O'Connor, it is not necessary to determine the likelihood of success in particular cases.\textsuperscript{95} Rather, the proper method of enhancement is based on the market's treatment of contingent cases as a class.\textsuperscript{96} In proposing that trial courts arrive at market-based enhancements without assessing the probability of success in particular cases, the dissenting opinion does not suggest how such enhancements should be computed.\textsuperscript{97}


In his plurality opinion, Justice White found the legislative history to be inconclusive on the issue of whether Congress intended to allow contingency enhancements. \textit{Delaware Valley II}, 107 S. Ct. 3078, 3086 (1987) (plurality opinion). He found a divergence in both the analysis and result in the three cases cited in the Senate Report which properly applied the Johnson factors. \textit{Id.} However, the holdings in \textit{Davis} and \textit{Swann} are not inconsistent with the holdings in \textit{Stanford Daily}. In \textit{Davis}, the court allowed an enhancement based on the excellent results achieved and the difficulty of the issue, but it did not consider a contingency enhancement at all. \textit{Davis}, 8 Emp. Prac. Dec. (CCH) ¶9444. In \textit{Swann}, the court actually reduced a plaintiff's request for fees based on the application of nine subjective factors similar to those stated in \textit{Johnson}, but no contingency enhancement was considered or apparently requested. \textit{Swann}, 66 F.R.D. at 484–86. \textit{Stanford Daily} is the only case of the three cited in the Senate Report which considers contingency enhancements, so its result and analysis are not inconsistent with the results and analyses in \textit{Davis} and \textit{Swann}.

\textsuperscript{95} \textit{Delaware Valley II}, 107 S. Ct. at 3097 (Blackmun, J., dissenting).

\textsuperscript{96} \textit{Id.} at 3089 (O'Connor, J., concurring).

\textsuperscript{97} The dissent's market approach is based on the analysis of the American Bar Association's Amicus Curiae brief, which also does not explain how to put the "market" theory into practice. Brief of the American Bar Association as Amicus Curiae in Support of Respondent Delaware Valley Citizens' Council for Clean Air, \textit{Delaware Valley II} (No. 85-5).
Any such computation should presumably be based on assessments of actual markets for contingent cases as a class. However, because no market exists from which to compute such enhancements, methods of applying the “market” approach based on actual markets for contingent cases as a class likewise cannot exist. Unlike hourly rates which are readily identifiable in a particular market, compensation for contingency in cases subject to fee-shifting statutes has no basis in the marketplace. Any method of applying the dissent’s “market” approach must therefore be based on hypothetical markets for contingent cases as a class. Many lower courts are likely to conclude that they cannot award contingency enhancements based on hypothetical markets.

2. Burden of Proof Requirements

The Court’s adoption of two onerous burden of proof requirements for parties seeking enhancements based on contingency further impairs the prevailing attorney’s ability to recover contingency enhancements.

a. Burden To Show Substantial Difficulty in Locating Counsel

First, in order to be eligible for a contingency enhancement, fee applicants must prove that they “faced substantial difficulties in finding counsel in the local or other relevant market.” The apparent rationale for this test is that if the relevant market has a sufficient supply of competent attorneys accepting cases for which only a basic lodestar fee award is available, the award is large enough without a contingency enhancement.

The fee applicant’s burden to prove substantial difficulties in finding counsel requires a hindsight evaluation by a judge applying terms which are not defined in the Court’s opinions. The Court offers no guidance on how many other attorneys must be consulted in order for

98. Dobbs, supra note 14, at 475.
99. One court, in the wake of the Delaware Valley II decision, has attempted to guide the district court in formulating a method of enhancing the market-based hourly rate to reflect “market” contingency. See Blum v. Witco Chem. Corp., 829 F.2d 367, 380-82 (3d Cir. 1987). According to this court, the enhancement “might have to be based on an econometric model that determined the mathematical relationship between hourly rate and contingency.” Id. at 380. The Third Circuit panel was searching for a method of determining how the actual market compensates for contingency. However, a mathematical relationship between hourly rates and contingency is not likely to be found because contingency is not normally reflected in market-based hourly rates. See Dobbs, supra note 14, at 475.
100. Delaware Valley II, 107 S. Ct. at 3089 (plurality opinion).
101. Id.
the difficulties to be considered "substantial," and does not explain the qualifications an attorney must meet to be considered "competent." Therefore, the Court's test allows a court to conclude, based on ambiguous and undefined terms, that contingency enhancements are not allowed in virtually every case.102

It appears that the only way a fee applicant can meet the burden imposed by the test is to produce evidence that the client visited and was rejected by other counsel. However, reliable written documentation that such rejections occurred is unlikely to be available from a client.103 The existence of substantial difficulties in finding counsel may be a relevant factor indicating that enhancement is required in order to attract competent counsel. But requiring an attorney to prove such difficulties in order to receive compensation for contingency contravenes Congress' purpose in enacting the fee-shifting statutes. By focusing on actions taken by clients rather than on the actions of attorneys which justify a fully compensatory fee award, this threshold test is not appropriate in applying statutes designed to provide an incentive for the private enforcement of Congressional policy.

b. Burden To Show How Market Compensates for Contingency

The second burden which the fee applicant must meet is to prove "the degree to which the relevant market compensates for contingency."104 Justice O'Connor, who specifically adopted this requirement in adopting the dissent's "market" approach, does not indicate how this burden can be met. Proving how a particular relevant market actually compensates for contingency will be extremely difficult because no market exists from which to determine how contingency in fee-shifting cases is compensated.105

102. Of course, the same ambiguous terms might also be interpreted by judges to allow contingency enhancements in every case. However, rejection of contingency enhancements is the more likely result. One court has already relied on the "substantial difficulties" test to deny recovery of a contingency enhancement. See Spell v. McDaniel, 824 F.2d 1380, 1404-05 (4th Cir. 1987).

103. The Court's test will encourage attorneys and clients to take artificial actions which Congress could not have intended. In order to be sure that a contingency adjustment would be available, an attorney desiring to take a case for which an attorney's fee award could be available will have to assemble evidence that the client shopped for and had difficulty retaining a lawyer to take the case. Thus, the attorney will have an incentive to ask a potential client to visit other attorneys with the sole purpose of being rejected because the risk of not being paid is too great. In actions requesting injunctive relief, such an incentive could result in artificial delays detrimental to the client's interests. Such a result flies in the face of Congress' intent in enacting fee-shifting provisions for the expeditious enforcement of remedial legislation.


105. See supra note 98 and accompanying text.
C. Implementation of Delaware Valley II by the Courts

Lower courts need not interpret Delaware Valley II as requiring enhancement computations based on actual market compensation for contingency. Instead, courts can achieve the incentive effect intended by Congress by awarding enhancements for contingency tied to enhancements for delay.

1. Compensation for Delay

After computing the lodestar amount, courts should award enhancements for delay in all appropriate cases.\textsuperscript{106} The proper method of computing the delay enhancement is to award interest on lodestar amounts. This amount can be computed using historic market-based hourly rates, the hourly rates in effect at the time the services were rendered.\textsuperscript{107} The use of market interest rates in effect over the period the attorney’s services were performed compensates for both the inflation and interest elements of the delay enhancement.\textsuperscript{108} The analysis can be simplified by computing the historic rate lodestar amounts for each year of the litigation and compounding interest on an annual basis using the actual market interest rate for each period.\textsuperscript{109}

For example, an attorney might agree to represent a client and receive compensation solely by virtue of a fee-shifting statute. On the last day of the litigation, after three full years, the court awards lodestar fees of $5000 per year, or $15,000 total. The court could assume

\textsuperscript{106} The question of the allowance of delay enhancements was expressly left open by five Justices in Delaware Valley II. Delaware Valley II, 107 S. Ct. at 3082 (plurality opinion). See supra note 34.

\textsuperscript{107} Daly v. Hill, 790 F.2d 1071, 1081 (4th Cir. 1986); Johnson v. University College, 706 F.2d 1205, 1210 (11th Cir.), cert. denied, 464 U.S. 994 (1983).

\textsuperscript{108} Market interest rates include a component for anticipated inflation. Ohio-Sealy Mattress Mfg. v. Sealy Inc., 776 F.2d 646, 663 n.17 (7th Cir. 1985); P. Samuelson, Economics 608–09 (10th ed. 1976).

\textsuperscript{109} The award of a delay enhancement based on interest charges to historic rates has been criticized because it requires judges to determine the time when billing would have taken place. Dobbs, supra note 14, at 476–77. Judges need not have difficulty making such a determination. First, billing periods can be established. For example, total fees for each year can be considered billed on the last day of the year for purposes of the interest computation. Second, the court can place the burden on the fee applicant to present the billing records and interest computations for review by the judge. With the use of computers, changes in historic rates during the fee determination process can be reflected in the interest computation without difficulty.

Compounding has historically not been allowed in the computation of prejudgment interest. See D. Dobbs, Remedies 164 (1973). This rule has been applied to interest enhancements to lodestar fees. See Gabriele v. Southworth, 712 F.2d 1505, 1508 n.1 (1st Cir. 1983). There is no economically rational basis for the rule, and compounding should be permitted in awarding a complete delay enhancement.
the fees would have been billed at the end of each year of the litigation. If the average market interest rate was six percent the first year, eight percent the second year, and ten percent the third year, the fee enhancement based on the delay in receiving payment is $1440. An enhancement based on delay is only appropriate to the extent the prevailing attorney does not receive payments of the lodestar amount during the course of the litigation.

Many courts simplify the task of awarding delay enhancements by computing the lodestar amount using current market-based hourly rates, the hourly rates in effect at the time of the fee determination. The use of current hourly rates is an inaccurate method of computing the lodestar amount. Current hourly rates reflect increases from the historical rates based, in part, on the lawyer's increased skill and experience. Also, billing rates may grow at a rate different from the rate of inflation. Because historic market-based hourly rates are the rates prevailing when the services are performed, they are a more accurate measure of the attorney's fees incurred. Courts can therefore accurately compute enhancements for delay in receiving payment by using historic market-based hourly rates adjusted based on market rates of interest.

Although enhancements for delay are required in all appropriate cases in order to achieve a complete attorney's fee award, such enhancements are not available if the losing party is the United States or one of the fifty states. In Library of Congress v. Shaw, the Supreme Court held that, based on the doctrine of sovereign immu-
nity, an enhancement to a lodestar attorney’s fee award for delay could not be recovered against the United States. The Court concluded that, in providing for an award of costs, including reasonable attorney’s fees, to the prevailing party, Congress did not expressly waive the government’s immunity from paying interest. According to the Court, because enhancement for delay is equivalent to an award of prejudgment interest, no enhancement for delay is available against the United States.

States enjoy sovereign immunity based on the Eleventh Amendment of the United States Constitution. Therefore, it is unlikely that delay enhancements can be recovered from them absent an express legislative waiver of immunity.

The Court’s allowance of immunity for federal and state governments from enhancements for delay contravenes the purpose of the fee-shifting statutes. Without compensation for delay, the incentive for lawyers to take cases in which a state or federal government is the defendant is incomplete. Congress intended that prevailing parties

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118. The Court’s argument was that, absent Congress’ consent, the United States is immune from suit. Shaw, 106 S. Ct. at 2962 (citing United States v. Sherwood, 312 U.S. 584 (1941)). Based on this sovereign immunity, the rule emerged that “interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress.” Shaw, 106 S. Ct. at 2962.

119. Id. at 2965.

120. Id. In addition, the Court stated that a statute which awards costs, including reasonable attorney’s fees, does not waive immunity for prejudgment interest, which is considered damages. Id.

Following the decision in Shaw, lower courts are refusing to allow the use of current market-based hourly rates in computing the lodestar amount when fees are assessed against the United States. Such rates include an enhancement for delay, which the courts consider a violation of the sovereign immunity doctrine. See Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 50, reh’g granted, 830 F.2d 1182 (D.C. Cir. 1987); Young v. Pierce, 822 F.2d 1376, 1380 (5th Cir. 1987).

121. The Eleventh Amendment of the United States Constitution has been interpreted by the Supreme Court to grant the individual states immunity from an award of damages or retroactive relief in actions based on federal law. Edelman v. Jordan, 415 U.S. 651 (1974). See also Comment, Attorneys’ Fees and the Eleventh Amendment, 88 HARV. L. REV. 1875 (1975). Congress has the power to set aside this immunity, and such a power was exercised in awarding costs, including reasonable attorney’s fees, under federal fee-shifting statutes. Hutto v. Finney, 437 U.S. 678, 693–95 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). However, by analogy to the Court’s holding in Shaw, Congress did not waive the states’ immunity from interest on fee awards in enacting the fee-shifting statutes.

122. See Rogers v. Okin, 821 F.2d 22, 26–28 (1st Cir. 1987), cert. denied, 108 S. Ct. 709 (1988); contra Jenkins v. Missouri, Nos. 87-2075, 87-2076, 87-2077 (8th Cir. Jan. 29, 1988) (LEXIS, Genfed library, USAPP file) (finding the sovereign immunity doctrine and the holding in Shaw to be inapplicable when delay is considered as one factor in setting the reasonable market-based hourly rate in an attorney’s fee award against a state).
Attorney's Fee Contingency Enhancements

recover reasonable attorney's fees regardless of the status of the losing party. Nevertheless, enhancements for delay are allowed after Shaw in awards from private parties.¹²³

2. Contingency Enhancements Tied to Delay Enhancements

One possible method of applying the dissent's "market" approach to computing contingency enhancements is to increase the interest rate used to compute a proper enhancement for delay to reflect the fact that a person investing in a risky venture requires a higher than normal rate of return.¹²⁴ For example, in the delay example discussed above,¹²⁵ if the court doubled the relevant market interest rates to account for both delay and contingency together, the total enhancement to the $15,000 lodestar fee would be $2960.¹²⁶ The effect of this computation is to award prevailing attorneys interest on the lodestar amount from the time services were performed, based on higher than normal market interest rates, in order to account for both their delay in receiving payment and their assumption of the risk of nonpayment.¹²⁷

This approach is designed to base compensation for contingency on the difference in market treatment of contingent cases subject to fee-shifting statutes "as a class."¹²⁸ Such a method, however, would initially require the use of interest rates which have no actual basis in the marketplace.¹²⁹ Many lower courts are likely to conclude that any enhancement based on hypothetical markets cannot be "objective and

¹²³. Bebchick v. Washington Metro. Area Transit Comm'n, 805 F.2d 396, 409 n.34 (D.C. Cir. 1986) (Shaw does not apply to a case "which does not involve the Government or the doctrine of sovereign immunity . . . ").

¹²⁴. Delay and contingency are related concepts. See, e.g., Delaware Valley II, 107 S. Ct. 3078, 3099 (1987) (Blackmun, J., dissenting) ("Delay in payment causes cash-flow problems and deprives an attorney of the use of money, thus magnifying the economic risk associated with the uncertainty of payment").

¹²⁵. See supra note 110 and accompanying text.

¹²⁶. The enhancement is computed as follows:

Year one: no enhancement because the fee is assumed to have been billed on the last day of the year.

Year two: $5000 × 16% = $800.

Year three: ($5000 + $800 + $5000) × 20% = $2160.

The total enhancement is $2960 ($800 + $2160). The delay enhancement is $1440. See supra note 110. The contingency enhancement is $1520.

¹²⁷. An enhancement for contingency would be awarded only to the extent the prevailing attorney actually assumed a risk of nonpayment. To the extent the attorney was able to mitigate the risks of nonpayment, no contingency enhancement would be allowed. See Delaware Valley II, 107 S. Ct. at 3102 (Blackmun, J., dissenting).

¹²⁸. See supra note 78 and accompanying text.

¹²⁹. See supra note 98 and accompanying text.
nonarbitrary" as required by Justice O'Connor in *Delaware Valley II*. 130

Because five Justices agreed that contingency enhancements are permitted under fee-shifting statutes, lower courts should not interpret the decision in *Delaware Valley II* as effectively eliminating such enhancements. In the approach to compensating contingency based on delay enhancements, although the enhancement to interest rates in a particular market may not be objectively determinable by reference to an actual market, courts can derive an initial computation of the enhancement by reference to some hypothetical market. 131 Once a court establishes an enhancement amount, that amount controls future cases in the same market unless the fee applicant makes an affirmative showing that the market for public interest lawyers requires larger contingency enhancements. 132 In this way, a market for use in computing contingency enhancements will evolve over time.

Combining delay and contingency enhancement computations would have significant benefits. Because of the presumption that a court's prior interest rate enhancement is the proper amount in a particular market, the computation of the contingency enhancement would be predictable. The difficulties inherent in the "multiplier" approach would largely disappear because courts would not assess the riskiness of particular cases. 133 And a significant incentive would be created to prevent a defendant from delaying litigation. 134

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130. *Delaware Valley II*, 107 S. Ct. at 3090 (O'Connor, J., concurring). By both accepting the dissent's "market" approach and requiring objective computations when no actual market for contingent cases exists, Justice O'Connor's analysis is fundamentally inconsistent. Under such an interpretation of *Delaware Valley II*, a fee applicant may never be able to sustain the burden of proving how the relevant market compensates for contingency.

131. The initial interest rate used by a court to apply the contingency enhancement in a particular market can be determined in a number of ways. For example, the rate might be based on an analogous "risky" interest rate existing in the relevant market, or on empirical studies which determine the interest rate adjustment necessary to make lawyers indifferent between contingent and noncontingent employment.

The initial computation of the market enhancement for contingency, and any subsequent modifications to that computation, must not be based on case-specific subjective factors such as "novelty and difficulty of the issues presented" and "the potential for protracted litigation." *Delaware Valley II*, 107 S. Ct. at 3087 (plurality opinion); *id.* at 3089 (O'Connor, J., concurring).

132. *Id.* at 3090 (O'Connor, J., concurring).

133. See supra notes 70-75 and accompanying text.

134. However, because of the doctrine of sovereign immunity, a recovery of contingency enhancements based on the computation of delay enhancements would not be available against the federal and state governments. See supra notes 117-22 and accompanying text.
D. Amendments to Fee-Shifting Statutes

If lower courts refuse to award contingency enhancements based on the Delaware Valley II decision, Congress should amend fee-shifting statutes to provide specifically for the computation of contingency enhancements. A fee computed under the lodestar approach does not fully compensate the prevailing attorney because it does not compensate for delay and the risk of nonpayment. The incentive for attorneys to take public interest cases that Congress was attempting to create in the private sector will be incomplete without contingency enhancements. In amending fee-shifting statutes, Congress should consider adopting specific computation methods to provide guidance to the courts.

Congress should also allow the application of delay enhancements against all losing parties by amending fee-shifting statutes to waive the sovereign immunity from interest of federal and state governments. The abolition of sovereign immunity from interest in the attorney fee context would be consistent with the purpose of the fee-shifting statutes of providing a complete incentive for the private enforcement of Congressional policies.

IV. CONCLUSION

In order for Congress to achieve the intended incentive effect of fee-shifting statutes, prevailing attorneys must be able to recover a full and complete attorney's fee award. Such a recovery must include enhancements to the lodestar amount based on delay and contingency in all appropriate cases. In Delaware Valley II, the Supreme Court failed to adopt clear and complete guidelines to the lower courts in awarding contingency enhancements and imposed strict burden of proof requirements on fee applicants. This Note proposes a method of compensating contingency based on delay enhancements, which is consistent with the approach approved by a majority of the Justices in Delaware Valley II.

Congress has the ultimate responsibility to ensure that its statutory intent is carried out and to respond to judicial decisions which run counter to its desires. If the result of the Court's decision in Delaware Valley II is to eliminate contingency enhancements, Congress must recognize the importance of fee-shifting statutes to the enforcement of

135. See supra notes 87–89 and accompanying text.
its policies and amend those statutes to provide the appropriate incentives for attorneys to accept and pursue public interest cases.

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