with the *Celotex* trilogy and by limiting its section 2 discussion to the tying context.\(^77\) In the meantime, however, American industries face the consequences of the Court forgetting that “relative clarity is itself an attribute of justice, allowing private parties to plan their affairs, minimizing the social burdens of uncertainty and the costs of litigation, and reducing the likelihood of quixotic results flowing from vague standards, inconsistently applied.”\(^78\)

**B. Attorneys’ Fees.**

*Fee Enhancement.* — The enforcement of federal statutes by “private attorneys general” represents a Madisonian “policy of supplying, by opposite and rival interests, the defect of better motives.”\(^1\) In areas such as civil rights or environmental litigation, in which large damage awards are generally unavailable to attract private practitioners,\(^2\) the incentive to bring public interest lawsuits depends heavily upon statutory provisions authorizing courts to award a “reasonable attorney’s fee” to prevailing parties.\(^3\) The appropriate amount of the fee, however, has spurred considerable debate. Nearly ten years ago, Justice Brennan lamented that the “straightforward command” of the federal fee-shifting statutes had been replaced “by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein’s monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake.”\(^4\) Last term, in *City of Burlington v. Dague*,\(^5\) the Supreme Court attempted to tame this monster, and held that a reasonable fee does not include

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\(^77\) If so limited, the application of § 2 will represent a mere “piling on” that neither alters the quality of the offense nor incrementally deters procompetitive activity.


\(^1\) The Federalist No. 57, at 322 (James Madison) (Clinton Rossiter ed., 1961).

\(^2\) See 122 CONG. REC. 33,374 (1976) (statement of Sen. Kennedy) (“[Civil rights cases — unlike tort or antitrust cases — do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer.”). As the Senate report approving fee-shifting for civil rights claims observed, “[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.” S. REP. NO. 1011, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910.

\(^3\) Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C.A. § 1988(b) (West Supp. 1992). Although § 1988 is the most prominent fee-shifting provision, Congress has enacted 156 statutes providing for fee shifting in one context or another. See Herbert B. Newberg, ATTORNEY FEE AWARDS § 28.01, at 478–87 (1986 & Supp. 1992) (listing statutes). The Supreme Court has noted that the generally similar wording among fee-shifting statutes is a “strong indication that they are to be interpreted alike.” Independent Fed’n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (internal citation omitted).


a risk premium for cases taken by attorneys on a contingent-fee basis.\textsuperscript{6} The absence of such premiums, however, will render many forms of public litigation less profitable than private work; as a result, the Court's decision will undermine the enforcement of important federal rights.

The plaintiffs in \textit{Dague} owned land adjacent to a landfill owned and operated by the city of Burlington, Vermont.\textsuperscript{7} In 1985, the Dagues sued the city for operating the landfill in violation of the Resource Conservation and Recovery Act (RCRA),\textsuperscript{8} the Clean Water Act (CWA),\textsuperscript{9} and the Vermont Groundwater Protection Law.\textsuperscript{10} The district court held for the plaintiffs on several of these claims and ordered the city to close the landfill.\textsuperscript{11} Finding that the Dagues had "substantially prevailed," the court ordered the city to pay attorneys' fees pursuant to the fee-shifting provisions contained in the RCRA and the CWA.\textsuperscript{12} In calculating the fee award, the district court used as a base amount the "lodestar" product of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."\textsuperscript{13} The court then enhanced this figure by 25% to compensate the Dagues' attorneys for the risks assumed in taking the case on a contingent-fee basis.\textsuperscript{14} On appeal, the Second Circuit affirmed both as to the merits and the fee award.\textsuperscript{15} The Supreme Court granted certiorari solely on the fee enhancement issue.\textsuperscript{16}

In a 6–3 decision, the Supreme Court reversed the 25% enhancement.\textsuperscript{17} The decision resolved an issue which first arose in \textit{Pennsylvania v. Delaware Valley Citizens' Council for Clean Air} (Delaware

\textsuperscript{6} See id. at 2643–44. All fees awarded under fee-shifting statutes are "contingent" in the sense that they may only be awarded to prevailing parties. See, e.g., 42 U.S.C.A. § 1988(b). Unless otherwise noted, "contingency" in this Comment is taken to mean that the attorney will be paid \textit{only} if he prevails and receives a fee award. Such an arrangement is distinct from, although not mutually exclusive with, a contingency contract in which the attorney receives a share of the plaintiff's monetary recovery.


\textsuperscript{10} \textit{Vt. STAT. ANN. tit. 10, § 1470 (1991 Supp.).}


\textsuperscript{12} Id. at 472. Section 6972(c) of the RCRA and § 1366(d) of the CWA both authorize a court to "award costs of litigation (including reasonable attorney... fees) to any prevailing or substantially prevailing party." 42 U.S.C. § 6972(c) (1988); 33 U.S.C.A. § 1366(d) (West Supp. 1991).

\textsuperscript{13} Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The term "lodestar" stems from the figure's role as "the guiding light of [the Court's] fee-shifting jurisprudence." \textit{Dague}, 112 S. Ct. at 2641.

\textsuperscript{14} See \textit{Dague v. City of Burlington}, 935 F.2d 1343, 1356, 1359–60 (4th Cir. 1991).

\textsuperscript{15} See \textit{id.} at 1360.


\textsuperscript{17} Justice Scalia delivered the opinion of the Court, which was joined by Chief Justice Rehnquist and Justices White, Kennedy, Souter, and Thomas.
In that case, the Court considered a contingency modifier similar to the one at issue in *Dague*. The *Delaware Valley II*, however, resulted in a 4–1–4 split among the justices. Although a majority in that case rejected the modifier on the facts of the case, they nonetheless failed to decide whether such modifiers were always prohibited as a matter of law. Revisiting the issue in *Dague*, the majority adopted Justice White’s *Delaware Valley II* plurality opinion, and held that “enhancement for contingency is not permitted under the fee-shifting statutes at issue.”

Writing for the Court, Justice Scalia argued that “an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar.” Risk of loss in a particular case, according to Justice Scalia, is a product of two factors: “(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits.” The second factor is normally subsumed in the lodestar because a claim that is more difficult to establish will require either more hours or a more experienced attorney who commands a higher hourly rate. The majority saw the first factor, however, as an improper consideration in calculating the fee award: because “no

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19 Prior to *Dague*, the Court had authorized adjustments of the lodestar figure based on a number of factors such as delay in payment, see Missouri v. Jenkins, 491 U.S. 231, 253–54 (1989), or the results obtained in the litigation, see *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 (1983). See generally *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 171, 179–80 (5th Cir. 1973) (listing 12 factors). Gradually, however, the Court had held one adjusting factor after another to be “subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.” *Hensley*, 461 U.S. at 434 n.9; see also *Blum* v. *Stenson*, 465 U.S. 885, 898–900 (1984) (holding that enhancement for novelty and complexity was already “fully reflected in the number of billable hours recorded by counsel” or “in the reasonableness of the hourly rates”).

20 In *Delaware Valley II*, Justice White’s plurality opinion unequivocally rejected contingency enhancements. See 483 U.S. at 713–31. Justice Blackmun dissented in that case, arguing that such enhancements should nearly always be available. See id. at 735–55 (Blackmun, J., dissenting). Justice O’Connor provided the swing vote in a concurring opinion. She maintained that, although contingency enhancements were appropriate in certain limited circumstances, they should not have been awarded in that particular case. See id. at 731–34 (O’Connor, J., concurring); *The Supreme Court, 1986 Term—Leading Cases*, 102 Harv. L. Rev. 199, 299–300 (1987). Interpretations of *Delaware Valley II* by lower courts have varied considerably. Most courts have held Justice O’Connor’s critical concurring opinion to be controlling. See, e.g., *Soto* v. *Adams Elevator Equip. Co.*, 947 F.2d 543, 553 (7th Cir. 1991); *Martin* v. *University of S. Ala.*, 57 F.2d 604, 610–12 (11th Cir. 1990). Other courts have regarded *Delaware Valley II* as leaving the question of contingency enhancements open; of these, some courts have rejected contingency enhancements entirely, see *King* v. *Palmer*, 950 F.2d 771, 784 (D.C. Cir. 1991) (en banc), cert. denied, 112 S. Ct. 3554 (1992), while others have upheld such enhancements in general terms, see *Perotti* v. *Seiter*, 935 F.2d 761, 765 (6th Cir. 1991).
21 112 S. Ct. at 3562–64.
22 Id. at 3564.
23 Id.
24 See id.
claim has a 100% chance of success,9 consideration of the “merits” factor would mean that some enhancement would always be necessary.25 Moreover, to enhance compensation as the risk of a claim increases “would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones.”26

Justice Scalia then addressed an alternate test first advanced by Justice O’Connor in her Delaware Valley II concurrence and adopted by all three dissenters in Dague. That test rejected a case-by-case evaluation of the riskiness of particular claims in favor of examining how broad classes of claims are treated in the market.27 Hence, a plaintiff seeking a contingency enhancement would have to prove “the degree to which the relevant market compensates for contingency,” and “that without an adjustment for risk the prevailing party ‘would have faced substantial difficulties in finding counsel in the local or other relevant market.’”28 Justice Scalia rejected this approach as self-contradictory in its insistence on proof of substantial difficulty in finding counsel without assessing the risks in a particular case; after all, “the predominant reason that a contingent-fee claimant has difficulty finding counsel in any legal market . . . is that attorneys view his case as too risky.”29 Justice Scalia further noted that there is simply no market for a large proportion of contingency-fee cases other than the market which Congress had created via fee-shifting statutes. Therefore, “looking to that ‘market’ for the meaning of fee-shifting is obviously circular.”30 Finally, Justice Scalia asserted that an attempt to mirror the market on a class (as opposed to a case-by-case) basis would accurately treat only “those cases within the class that have the class-average chance of success”; cases with above average prospects will necessarily be overcompensated.31

The majority concluded by arguing more generally that “no contingency enhancement whatever is compatible with the fee-shifting statutes at issue.”32 According to Justice Scalia, contingency enhancements violate the statutory requirement that only “prevailing parties"

25 Id.
26 Id. at 2641–42. Justice Scalia assumed a scheme in which the contingency multiplier is the inverse of the claim’s chance of success. For example, a claim with a 20% chance of success would receive a fee multiplier of 5, while a claim with an 80% chance of success would receive a fee multiplier of 1.25. Absent the multiplier, an attorney would be four times as likely to take the 80% claim; with the multiplier, however, the attorney would be indifferent as to which claim to bring. See id. at 2641.
27 See Delaware Valley II, 483 U.S. at 733–34 (O’Connor, J., concurring).
28 Id. at 733 (quoting Delaware Valley II, 483 U.S. at 731 (plurality opinion)).
29 Dague, 112 S. Ct. at 2642.
30 Id.
31 Id. For example, attorneys who are 95% likely to prevail should not receive the same risk premium as those who bear a 50% chance of nonpayment.
32 Id. at 2643.
be compensated, because “[a]n 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.” A contingency enhancement would thus “in effect pay for the attorney’s time . . . in cases where his client does not prevail.” Moreover, the Court feared that such enhancements would make calculation of fees “more complex and arbitrary, hence more unpredictable, and hence more litigable.” Contingency enhancements thus contravened the principle that a fee application “should not result in a second major litigation.”

Justice Blackmun wrote the principal dissent. Emphasizing that the Court’s fee-shifting precedents require a “fully compensatory fee” that is “calculated on the basis of rates and practices prevailing in the relevant market,” he insisted that “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.” Justice Blackmun criticized the Court’s suggestion that contingency enhancements effectively award fees for losing cases for ignoring the distinction between the determination of entitlement to a fee award and the calculation of the amount. Under the statute, an attorney’s use of a fee award to finance other claims is irrelevant as long as only prevailing parties receive an award. The dissenters also discounted the Court’s administrability concerns on the ground that, under a class-treatment approach, the courts in each geographic market would be able to standardize treatment for each class of claims.

Justice Blackmun then turned to a defense of Justice O’Connor’s proposed test. Responding to the Court’s circularity objection, Justice Blackmun pointed out that the lodestar approach itself requires a district court to “find a relevant private market from which to select a fee”; any circularity problem is thus not unique to enhancements of the lodestar. Nor, according to Justice Blackmun, was the market-based approach self-contradictory in declining to consider the risks of particular cases. Instead, Justice O’Connor’s test was intended to equalize incentives between contingency and non-contingency cases,

33 Id.
34 Id.
35 Id.
36 Id.
37 Justice Stevens joined in Justice Blackmun’s dissent. Justice O’Connor wrote a separate dissent.
38 Dague, 112 S. Ct. at 2644 (Blackmun, J., dissenting) (citing Hensley, 461 U.S. at 435, and Missouri v. Jenkins, 491 U.S. 274, 286 (1989)).
39 Id.
40 See id. at 2646.
41 See id. at 2647.
42 Id.
rather than incentives between cases of varying degrees of risk.\textsuperscript{43} Rejecting all forms of contingency enhancement, Justice Blackmun concluded, ensures that "many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel."\textsuperscript{44} As a result, he warned, "[T]oday’s decision weakens the protections we afford important federal rights."\textsuperscript{45}

Despite the prominence of economic analysis in the majority opinion, the Court’s decision in \textit{Dague} sacrifices economic accuracy for the sake of administrability. Fee-shifting statutes are necessary because many federal statutory claimants seek either non-monetary relief or small monetary amounts that would be insufficient to attract lawyers who would normally charge a share of the recovery as their fee.\textsuperscript{46} Such claims are public goods, because "the cost to any private party of conducting the litigation may well exceed any gains he can expect, even though the total gain to all beneficiaries may greatly exceed the costs."\textsuperscript{47} Economic theory thus predicts that "citizens will free-ride on the benefits provided by others" rather than bring such suits themselves; as a result, private enforcement will never reach an optimal level in the absence of collective action to create additional incentives.\textsuperscript{48}

Fee-shifting statutes are designed to bring incentives for lawyers to undertake public interest litigation in line with the incentives they have to bring claims for which they are paid up front. As Justice

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\textsuperscript{43} See id. at 2545–47.

\textsuperscript{44} Id. at 2548.

\textsuperscript{45} Id. Justice O’Connor filed a separate dissenting opinion that essentially echoed Justice Blackmun’s reasoning. She wrote separately, however, in order to reject the district court’s consideration of case-specific factors to determine that, without the possibility of a fee enhancement, the plaintiffs would not have been able to obtain competent counsel. Justice O’Connor would have instead vacated the award and remanded "for a market-based assessment of a suitable enhancement for contingency." Id. at 2548 (O’Connor, J., dissenting).

\textsuperscript{46} See \textit{Delaware Valley II}, 483 U.S. at 749 (Blackmun, J., dissenting). The CWA and RCRA, for example, do not provide for monetary damages. See 33 U.S.C.A. § 1365(a) (West Supp. 1993); 42 U.S.C. § 6972(a) (1988).

\textsuperscript{47} Thomas D. Rowe, Jr., \textit{The Legal Theory of Attorney Fee Shifting: A Critical Overview}, 1982 Duke L.J. 651, 669. For example, "Congress determined that the public as a whole has an interest in the vindication of [civil rights] over and above the value of a civil rights remedy to a particular plaintiff." Hensley v. Eckerhart, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part). Similarly, the Dagues’ action enforcing the RCRA and CWA conferred a benefit on all who might have been affected by pollution of the local groundwater. Private enforcement of both civil rights and environmental statutes meets the traditional definition of a public good: such enforcement is non-excludable because those who work to secure the good cannot keep others from enjoying it, and non-rivalrous because enjoyment of the statutes’ protection by one individual does not interfere with enjoyment by another. See William R. Murelko, Note, \textit{A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes}, 1989 Duke L.J. 438, 459–56.

\textsuperscript{48} Murelko, supra note 47, at 456.
Brennan observed in *Hensley v. Eckerhart*, 49 that "the legislative history of § 1988 reveals Congress' basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in civil rights cases . . . would seldom be equivalent to recoveries in most private-law litigation." For this reason, the Court's fee-shifting cases prior to *Dague* consistently attempted to replicate the private market. *Dague*, however, deemphasized this attempt in the interests of administrability.

Contingency enhancements, however, are an essential component of the market. According to Professor Leubsdorf, "[a] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." Barring contingency enhancements requires lawyers to run a substantial risk of nonpayment for the same return that they receive from clients who pay in advance. Failing to compensate for risk thus defeats the statutory goal of "attract[ing] 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."

50 Id. at 447 (Brennan, J., concurring in part and dissenting in part) ("It is intended that the amount of fees awarded under § 1988 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." (citing S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.A.N. 5908, 5913)).
51 See, e.g., Missouri v. Jenkins, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded under § 1988 are to be based on market rates for the services rendered."); Blum v. Stenson, 465 U.S. 885, 894-95 (1984) (requiring the calculation of fees at private market rates even for plaintiffs represented by nonprofit counsel).
52 See *Dague*, 112 S. Ct. at 2643 ("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.").
53 John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981); see also Samuel R. Berger, *Court Awarded Attorneys' Fees: What is 'Reasonable'?*, 116 U. PA. L. REV. 281, 344-25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk."). Indeed, the case that originated the lodestar method observed that "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 481 F.2d 161, 168 (3d Cir. 1973).
54 Compensating a lawyer for the risk of nonpayment, of course, enables him to recoup his losses from cases in which he was not a "prevailing party." *See Dague*, 112 S. Ct. at 2643. Justice Blackmun is surely correct, however, in observing that the prevailing parties requirement limits only the parties that can receive fees, not the amount that they can receive if eligible. See supra note 40 and accompanying text. After all, even a lodestar award subsidizes non-prevaling claims to the extent that an attorney reinvests his normal profit in other suits.
55 *Dague*, 112 S. Ct. at 2644 (Blackmun, J., dissenting). Justice Blackmun went on to point out that, "[f]ederal fee-bearing litigation is less remunerative than private litigation, then the
Justice Scalia concedes that the aspect of contingent risk represented by "the legal and factual merits of the claim" is not subsumed in the lodestar; indeed, he argues that incorporating risk would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." This argument, however, simply misconstrues the nature and purpose of the contingency enhancements advocated by the dissent. As the dissenters noted in Delaware Valley II:

Enhancement for risk is not designed to equalize the prospective returns among contingent cases with different degrees of merit. Rather, it is designed simply to place contingent employment as a whole on roughly the same economic footing as noncontingent practice, in order that such cases receive the equal representation intended by Congress.

Hence, although Justice Scalia's argument for not awarding an enhancement that is the inverse of the particular claim's chance of success may be compelling, it is not a sufficiently persuasive reason to reject contingency enhancement generally. The optimal solution would consist of a modifier that would leave attorneys indifferent as between accepting contingent or non-contingent employment, but not indifferent as to accepting contingent claims of greater or lesser risk.

This goal could be accomplished by a uniform contingency enhancement applicable to all relevant claims as a class. Setting such an enhancement would require judges initially to determine how much litigation a statute should encourage. Because the value of a claim

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." Id.

55 Dague, 112 S. Ct. at 2641-42.
57 See supra note 26.
58 Alternatively, some courts have taken market rates for non-contingent claims and enhanced them to arrive at a higher hourly rate which is then used to compute the lodestar. See, e.g., Northcross v. Board of Educ., 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). An even better approach — and one which is not necessarily precluded by the Court's decision in Dague — would utilize a market rate for contingency cases in calculating the lodestar. Most courts, however, calculate the lodestar based on hourly rates paid to attorneys not operating on a contingency basis. See, e.g., Hidle v. Geneva County Bd. of Educ., 681 F. Supp. 752, 754 (M.D. Ala. 1988) (calculating lodestar by multiplying the hours expended by "the prevailing market rate for non-contingent work"). This approach is probably inevitable because there is generally "no such thing as a market hourly rate in contingent litigation." 2 Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees, ¶ 16.04[4][a], at 16-154 (1992).
59 This proposal differs from Justice O'Connor's position in that the court (or the legislature) would choose an appropriate enhancement rather than attempting to derive it from the market. This method is still "market-based" because it is designed to equalize incentives as between contingent claims of a certain merit and private claims in which payment is guaranteed.
to an attorney is the product of his anticipated fee and the likelihood that the fee will be paid, courts could encourage plaintiffs to bring any suit that is more likely than not to succeed simply by doubling the fee awards for all suits brought on a contingency basis. A multiplier of two will render lawyers indifferent as to accepting non-contingent cases or contingency cases with a 50% chance of success because the value of a fee paid up front is approximately equal to the value of a fee that is twice as large but only half as likely to be paid. If the multiplier remains at two regardless of the risk of the particular claim, moreover, then attorneys have an incentive to maximize their returns by bringing only claims that have a better than 50% chance of success. Hence, a uniform multiplier would not encourage frivolous claims by rendering attorneys indifferent as to varying degrees of risk. By eliminating the need for judges to assess the risk of particular cases, a uniform enhancement would also largely obviate the administrability concerns voiced by the majority opinion.

Justice Scalia, however, criticizes uniform treatment for overcompensating those claims with a lower level of risk than that corresponding to the set level of enhancement. If the uniform multiplier is two, for example, then all claims with more than a 50% chance of success will be overcompensated. Of course, it is hard to see how this problem justifies barring contingency enhancements entirely, because doing so guarantees that plaintiffs’ attorneys are never compensated accurately. The overcompensated claims, moreover, are by definition more meritorious than most and are thus the claims society most wants to encourage. Finally, enhancements could be reduced or disallowed for certain pre-defined classes of cases that are clearly less risky. For example, one court has suggested that contingency enhancement is improper in a civil suit in which the United States has already obtained parallel criminal indictments against the defendants.

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61 See Leubsdorf, supra note 53, at 511. Multipliers larger or smaller than two might be appropriate depending on the amount of litigation desired. This Comment uses a doubling rule simply to illustrate the virtues of a uniform multiplier.

62 See id. The enhancement level might have to be altered somewhat to account for the possibility of risk-aversion, but such complications are beyond the scope of this Comment.

63 See Leubsdorf, supra note 53, at 503–05.

64 See Dugue, 112 S. Ct. at 2643.

65 See id. at 2642.

66 Riskiness, of course, is a function of a number of variables besides the truth of a potential plaintiff’s claim. Because the systemic concern is to avoid the drain on judicial resources arising from cases that will ultimately fail, however, it is irrelevant whether riskiness arises from falsity of the claim or from problems of proof.

67 See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (5th Cir. 1973) (antitrust case); see also Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 298 (2d Cir. 1987) (disallowing any contingency enhancement due to the minimal risk of not prevailing when an environmental defendant’s own monitoring records showed it to be in violation of its permit).
Because choosing a level of enhancement represents a policy choice as to the level of litigation society wishes to encourage, some have suggested leaving this question to the legislature. Absent any clear guidance in the fee-shifting statutes as to the amount of litigation that Congress desired, their argument has some merit. On the other hand, choosing a level of litigation is inherent in the determination of a "reasonable fee" — an enterprise that Congress has been content for many years to leave to the judiciary. Moreover, both the legislative history of the federal fee-shifting statutes and the consistent tendency of the Court's fee-shifting cases have required, up to now, that "a 'reasonable attorney's fee' should aim to be competitive with the private market, even if it is not possible to reflect that market perfectly." Given this history, the Dague majority's decision to abandon market treatment of contingent risk arguably violates the judicial role as custodian of congressional intent.

It is easy to understand, of course, the majority's wish to avoid drawn-out litigation over attorneys' fees. Indeed, Justice Brennan has described "appeals from awards of attorney's fees" as "one of the least socially productive types of litigation imaginable." Streamlining the process by eliminating contingency enhancements, however, is radical surgery indeed. After Dague, the best attorneys are more likely to avoid statutory-fee claims in favor of cases for which they will be paid win or lose; as a result, federal laws in such areas as civil rights and environmental safety face underenforcement. In the end, the Court may find that it has killed Frankenstein's monster rather than tamed it, and that the monster was necessary to protect the public from far greater perils.

C. Federal Preemption of State Law

Preemption of State Common Law. — Cigarette manufacturers have never compensated any plaintiff for injuries caused by smoking. They have never even offered to settle a tobacco products liability case. Instead, cigarette manufacturers have consistently litigated

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68 See, e.g., King v. Palmer, 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring) ("The allowance of a 100% enhancement is clearly legislative — making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better."); rev'd in part, 950 F.2d 771 (D.C. Cir. 1991) (en banc), and cert. denied, 112 S. Ct. 3054 (1992).


1 The wave of tobacco products liability litigation was initiated in the mid-1950s. See Robert L. Rabin, A Sociological History of the Tobacco Tort Litigation, 44 STAN. L. REV. 853, 854 & n.7, 857 (1992).