

THE SUPREME COURT'S DENIAL OF REASONABLE ATTORNEY'S FEES TO PREVAILING CIVIL RIGHTS PLAINTIFFS

JEAN R. STERNLIGHT*

Introduction	536
I. Limitations on Attorney's Fees Available to Prevailing Plaintiffs .	541
A. Compensable Hours	541
B. Compensable Rates	550
C. Adjustment of the Lodestar	552
1. Novelty and Complexity of Issues	553
2. Superior Quality of Representation	553
3. Results Obtained	554
4. Contingency	554
D. Related Decisions	566
1. Offers of Judgment	566
2. Waiver of Attorney's Fees	568
3. Expert Witness Fees	571
E. The Few Pro-Plaintiff Decisions.....	574
1. Compensation for Delay in Payment and Recovery of Interim Fees.....	574
2. Fees Exceeding Monetary Award.....	576
3. Fees Exceeding Contingent Agreement	577
4. Private Fee Agreements	579
5. Fees to Plaintiff Prevailing on Non-Major Issue.....	579
6. Compensation for Paralegal Work at Market Rates	581
II. Theoretical and Practical Flaws in the Supreme Court's Analysis of Civil Rights Attorney's Fees	582
A. The Flawed Lodestar Approach	582
B. A Conflict of Philosophies	586
C. The Problem of Delay	588
III. Steps Plaintiffs'-Side Civil Rights Attorneys Can Take to Protect Their Fee.....	592
A. Self-Help	592
1. Fee Agreement	592
2. Complete and Detailed Records	595
3. Simultaneous Suits to Protect Fees for Administrative Work	596

* B.A., 1979, Swarthmore College; J.D., 1983, Harvard University. Ms. Sternlight is currently a member and Vice President of Samuel & Ballard, P.C., Philadelphia, PA, specializing in plaintiffs'-side employment litigation.

4. Separate Retainer Agreements with Expert Witnesses ...	596
B. The Limits of Self-Help.....	597
IV. The Need for Congressional Action.....	599
A. Why Congressional Action is Needed.....	599
B. What Congressional Action is Needed.....	599
1. Comparable Rates.....	600
2. Reasonable Compensation for Contingency and Delay... ..	600
3. Award of Fees and Costs Reasonably Related to Any Issue on Which Plaintiff Prevailed.....	601
4. Compensation for Work Performed to Secure Administrative Relief.....	602
5. Prohibition of Forced Fee Waivers in Class Actions.....	602
6. Full Recovery of Expert Witness Fees.....	603
7. Protection of Fees Where Settlement Offer Rejected.....	603
8. Recovery of Fees Against Third Party Intervenors.....	604
C. The Proposed Civil Rights Act of 1990.....	604
1. The Act's Fee Provisions.....	605
2. Fee Issues Not Addressed by the Act.....	607
Conclusion.....	607

INTRODUCTION

The Supreme Court, through a series of recent decisions, has effectively overridden Congress' dictate that prevailing civil rights plaintiffs are entitled to recover reasonable attorney's fees and costs.¹ Yet, while the Supreme

1. Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982) [hereinafter Title VII], provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) [hereinafter Section 1988], provides in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [the Education Amendments of 1972], or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) [hereinafter ADEA], contains its own fee provision, 29 U.S.C. § 626(b), as do the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988) (fee provision at 29 U.S.C. § 794(a)) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988) (fee provision at 29 U.S.C. § 216(b)).

These statutory provisions constitute an exception to what the Court has called the "American Rule," under which prevailing litigants are ordinarily not entitled to collect attorney's fees from the losing party. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); see also *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (under § 204(b) of the Civil Rights Act of 1964, prevailing plaintiffs are ordinarily entitled to recover attorney's fees). See generally H. NEWBERG, *ATTORNEY FEE AWARDS* ch. 1 (1986 & Supp. 1989); Larson, *Current Proposals in Congress to Limit and to Bar Court-Awarded Attorneys' Fees in Public*

Court's recent attack on substantive civil rights law² has received substantial attention, even in the popular media,³ the Court's decimation of attorney's fee law has gone relatively unnoticed by the public.⁴

The Court's attack on the pocketbooks of prevailing civil rights litigants

Interest Litigation, 14 N.Y.U. REV. L. & SOC. CHANGE 523, 524 & n.3 (1986) (noting that most of the nearly 200 federal statutory provisions for fee awards were enacted since *Alyeska*); Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (discussing history of the American Rule); *The Supreme Court — Leading Cases*, 101 HARV. L. REV. 119, 290-91 (1987) (discussing Congress' expansion of fee legislation following issuance of *Alyeska*) [hereinafter *Leading Cases*].

2. *E.g.*, Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854 (1989) (employer may discriminate on the basis of age with respect to benefits, unless such discrimination is a subterfuge to evade the other requirements of the ADEA); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (municipality may not be held liable for employee's violation of Section 1981 under respondeat superior theory, but may only be held liable for customs or policies); Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) (42 U.S.C. § 1981 (1982) covers only racially motivated interference with formation of contract, and not harassment or other discrimination subsequent to formation of contract); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (state and state officials acting in their official capacity are not "persons" for purposes of 42 U.S.C. § 1983 (1982) [hereinafter Section 1983], except that state officials may be sued in official capacity for injunctive relief); Lorange v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (statute of limitations for disparate impact claim based on effect of facially neutral seniority system begins to run from date collective bargaining agreement is signed, not from date discriminatory impact becomes apparent); Martin v. Wilks, 109 S. Ct. 2180 (1989) (permitting white fire fighters to challenge promotion practices instituted years earlier under consent decree even though such fire fighters did not intervene in original action); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (requiring plaintiffs who seek to prove disparate impact to link statistical disparity to a specific facially neutral practice, and also holding that once a prima facie case is established, burden of production only, not proof, shifts to the employer).

3. *E.g.*, Hayes, *Job-Bias Litigation Wilts Under High Court Rulings*, Wall St. J., Aug. 22, 1989, at B1, col. 5.

4. The subject of court-awarded attorney's fees has not been entirely neglected, however, having received substantial attention from legal commentators over the years. *See, e.g.*, M. F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES (1986); E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981); H. NEWBERG, *supra* note 1; Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977) (advocating award of lodestar times risk of nonrecovery); Committee on Legal Assistance, *Counsel Fees in Public Interest Litigation*, 39 REC. OF N.Y.C. B. ASSOC. 300 (1984); *The Elusive Path to an Award of Attorney Fees Under 42 U.S.C. Section 1988*, 23 CLEARINGHOUSE REV. 16 (1989); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981) (contingency factor should be prescribed for category of cases, rather than based on probability of success of particular case at hand); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985); Rowe, *The Legal Theory of Attorney Fee-Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 LAB. LAW. 63 (1989); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act*, 80 COLUM. L. REV. 346 (1980) [hereinafter Note, *Promoting Vindication*]; Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677 (1983) (advocating award of fees to certain unsuccessful environmental litigants, given statutes which permit fee awards "when appropriate"); Note, *Attorney's Fee Enhancements: Toward a Complete Incentive to Litigate Under Federal Fee-Shifting Statutes*, 63 WASH. L. REV. 469 (1988); Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U. CHI. L. REV. 1074 (1986); *Leading Cases*, *supra* note 1, at 290; Newberg, *Decision Affects Enhancements Required in Statutory Fee Awards*, NAT'L L.J., Feb. 22, 1988, at 18. At least one newspaper has focused on the problem as well. Walsh, *The Vanishing Job-Bias Lawyers*, The Washington Post, July 6, 1990, at C1, col. 3.

and their attorneys has been subtle but devastating.⁵ Although the Court has paid lip service to the concept that reasonable fees and costs are necessary so that civil rights plaintiffs can obtain competent representation,⁶ its decisions over the last seven years have ensured that attorneys receive far less than is necessary to compensate them reasonably for the hours they expended on the litigation.

As a result, numerous attorneys have been forced to withdraw from civil rights practice for financial reasons.⁷ Consequently, many civil rights plaintiffs with colorable claims cannot find attorneys willing to represent them.⁸ The shortage of competent civil rights attorneys has reached crisis propor-

5. See generally Amicus Curiae Brief of Twelve Small Private Civil Rights Law Firms, In Support of Respondents, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (No. 85-5) [hereinafter Amicus Brief] (discussing devastating impact of inadequate fee decisions on twelve plaintiffs'-side civil rights-oriented law firms); Terry, *supra* note 4; Walsh, *supra* note 4 (attorneys report they cannot afford to handle civil rights cases; most lawyers who had handled such cases in the past have gone out of business).

6. See *infra* text accompanying notes 368-73. For example, eight Supreme Court Justices recently reiterated the position that awards of civil rights fees are theoretically to be governed by the same standards that apply in equally complex federal litigation. *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989).

7. See, e.g., Terry, *supra* note 4, at 63 ("private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places already extinct"); Walsh, *supra* note 4 (law firms cannot afford to try civil rights cases); Affidavit of Michael Churchill, Esq., *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988) (No. CIV. A. 75-3156) (on file with Author) (it has become increasingly difficult to find private attorneys willing to handle employment discrimination matters); Affidavit of Peter J. Kazdik, Esq., *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988) (No. CIV. A. 73-0974-BDP), reprinted in H. NEWBERG, *supra* note 1, app. at 737 (given the unfavorable economics, it is highly unlikely a firm would take a contingent Title VII class action, even for public interest reasons); Affidavit of Howell L. Ferguson, Esq., *Norton v. Tallahassee Memorial Hosp.*, No. 76-163-MMP (N.D. Fla. filed July 31, 1987), reprinted in H. NEWBERG, *supra* note 1, app. at 732 (firm ceased handling employment discrimination cases on totally contingent basis for economic reasons).

See also Affidavit of Michael P. Malakoff, Esq., *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988) (No. CIV. A. 75-3156), reprinted in H. NEWBERG, *supra* note 1, app. at 741 (firm decided not to undertake new employment discrimination cases due to risks involved in obtaining compensation). Mr. Malakoff cited statistics tabulated by the Administrative Office of the United States Courts showing a dramatic decrease in the filing of civil rights class actions over the years and partially attributed this decrease to "the reluctance of attorneys to represent employees in discrimination cases in light of the economic risk and potential economic rewards." *Id.* at 742-43.

8. In addition to the financial disincentives for litigating civil rights cases, the courts' application of Rule 11 of the Federal Rules of Civil Procedure may also deter attorneys from bringing plaintiffs' civil rights suits. One study showed that civil rights plaintiffs' attorneys were far more likely both to be targeted by defendants for Rule 11 sanctions and, ultimately, to be sanctioned, than were other attorneys. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 201 (1988). A recent Third Circuit Task Force study stated that Vairo's study was inaccurate for a variety of reasons, but nonetheless concurred with Vairo's conclusion that plaintiffs were sanctioned on motion far more frequently in civil rights actions than in other cases. The Task Force's data revealed that whereas plaintiffs were sanctioned on motion 47.1% of the time in civil rights cases, plaintiffs were sanctioned just 8.45% of the time on motion in non-civil rights cases. THIRD CIRCUIT TASK FORCE, *RULE 11 IN TRANSITION* (1989) (S. Burbank reprt).

tions, a fact which has been recognized by several state and federal courts.⁹ Judges, frustrated with this shortage, have sought to convince or coerce attorneys to fill the need.¹⁰

The solution to the current crisis lies not in reluctant court-appointed attorneys, but rather in a broad-based reform of the law regarding court-awarded attorney's fees. Although clever plaintiffs' attorneys can fight within the parameters of existing Supreme Court jurisprudence for reasonable attorney's fees and costs,¹¹ it is unlikely that these steps will prove successful. Ultimately, Congress will have to step in to assure reasonable compensation for the attorneys of prevailing civil rights plaintiffs.

Congress is currently considering legislation which, if enacted, would reverse certain adverse Supreme Court decisions addressed in this Article. However, the proposed legislation, while urgently needed, is not sufficient to fully restore Congress' original mandate guaranteeing reasonable attorney's fees and costs to prevailing civil rights plaintiffs.

This Article begins in Section I with a discussion of the cases in which the Supreme Court has sharply limited the attorney's fees available to prevailing plaintiffs in civil rights litigation.¹² Focusing on the fees awarded pursuant to

9. See, e.g., *Lattimore v. Oman Constr.*, 868 F.2d 437, 439 (11th Cir. 1989) (noting that the district court "found a 'dearth' of attorneys willing to accept employment discrimination cases on a contingency basis in the Northern District of Alabama and noted as well the difficulties experienced both by the local bar association's lawyer referral service and the court itself in finding attorneys willing to accept such appointments"); *Fadhl v. City & County of San Francisco*, 859 F.2d 649, 651 (9th Cir. 1988) (noting that, given the unappealing nature of Title VII cases for the private bar, substantial fee enhancements are necessary to persuade counsel to handle such cases); *Norwood v. Charlotte Memorial Hosp. and Medical Center*, 720 F. Supp. 543, 554 (W.D.N.C. 1989) (plaintiffs submitted evidence establishing the difficulty of finding counsel in employment discrimination cases); *Thompson v. Kennickell*, 710 F. Supp. 1, 8 (D.D.C. 1989) (granting contingency multiplier in part based on plaintiff's showing that very few attorneys are willing to handle class action employment discrimination matters, particularly against the government); *McKenzie v. Kennickell*, 684 F. Supp. 1097, 1103 (D.D.C. 1988) (plaintiffs submitted a substantial array of evidence demonstrating the shortage of attorneys willing to handle employment discrimination cases on a contingent fee basis), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989); *Hidle v. Geneva County Bd. of Educ.*, 681 F. Supp. 752, 758 (M.D. Ala. 1988) ("Alabama citizens who believe they are victims of discrimination would face substantial, and often insurmountable, obstacles in finding counsel absent the likelihood of fee enhancement for contingency."); *Palmer v. Shultz*, 679 F. Supp. 68, 75 (D.D.C. 1988) ("[I]t has become significantly more difficult to locate competent counsel willing to devote the time and resources necessary to conduct Title VII litigation.").

10. For example, one judge in the Southern District of Iowa required an unwilling attorney, pursuant to 28 U.S.C. § 1915(d), to represent an *in forma pauperis* litigant in a Section 1983 action regarding prison conditions. When the attorney, pleading lack of competence, sought a mandamus order from the Eighth Circuit permitting him to withdraw from the case, it was denied. The Supreme Court ultimately found, however, that while there is a growing need for attorneys to represent poor persons, 28 U.S.C. § 1915(d) does not permit courts to compel attorneys to represent indigents. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989).

11. See *infra* text accompanying notes 418-42.

12. Although the wording of Title VII and Section 1988 might have been interpreted to provide fees to prevailing defendants, as well as to prevailing plaintiffs, the Court has held that prevailing defendants are entitled to fees only where the plaintiff's action was frivolous, unrea-

such statutes as Title VII, Section 1988, and the Clean Air Act,¹³ Section I recounts how the Court has gradually chipped away at the total fee award by imposing limitations on the number of compensable hours,¹⁴ the rate of compensation, and enhancements which may be applied to the basic lodestar award. Section I also discusses decisions that have limited attorneys' fees by forcing them to accept settlements which require them to forego their fees,¹⁵ by capping the court-awarded compensation of expert witnesses at \$30 per day,¹⁶ and by pressuring them to accept offers of judgment which may cover little or none of their fees.¹⁷ Finally, Section I reviews the few decisions which purportedly protect attorney's fees, and discusses why their effect may be altogether different.

Section II critiques the flawed legal and economic reasoning underlying many of the Court's fee decisions and demonstrates the conflict between those decisions and Congress' express intent in passing the fee legislation. The Section suggests that the new body of caselaw makes it economically impossible for an attorney to practice civil rights law and thereby deprives all but a few wealthy or lucky civil rights plaintiffs of representation by experienced counsel.

Section III of the Article points to some ways in which plaintiffs' attorneys can work within and around the Court's adverse decisions in order to protect their fees. The section also acknowledges the limits of these remedial measures given existing precedents.

Finally, Section IV argues that only action by Congress will suffice to override the Supreme Court's erroneous rulings and ensure just compensation for civil rights attorneys. Absent such legislation, it seems virtually certain that both the quantity and quality of civil rights litigation will continue to

sonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Similarly, prevailing plaintiffs may not recover fees against losing intervenors unless the intervenors' action was frivolous, unreasonable, or without foundation. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989).

13. 42 U.S.C. § 7604(d) (1982). The Supreme Court has generally held that the various statutory attorney's fees provisions should be interpreted consistently with one another. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *see also Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) (attorney's fees provisions with similar wording should be interpreted consistently with one another). Thus, this Article distinguishes between the various provisions, such as Section 1988 and Section 706 of Title VII, only where such distinctions have been drawn by the courts. Some statutory fee provisions, however, are interpreted under slightly different standards. *See, e.g., Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983) (enunciating standards for award of fees pursuant to ERISA, 29 U.S.C. § 1001 (1988)). Even when interpreting ERISA, however, courts rely extensively on the body of law developed in the context of civil rights fee litigation. *E.g., Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989).

14. One court has even gone so far as to rule that attorneys who represent themselves, proceeding pro se in civil rights litigation, may not receive any attorney's fees at all. *Kay v. Ehrler*, 900 F.2d 967 (6th Cir. 1990), *petition for cert. filed*, No. 90-79 (July 11, 1990).

15. *E.g., Evans v. Jeff D.*, 475 U.S. 717 (1986).

16. *E.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

17. *E.g., Marek v. Chesny*, 473 U.S. 1 (1985).

decrease. Fewer lawyers will take on civil rights cases, and their expertise will be limited, because they will not be able to afford to specialize in civil rights litigation. Unless Congress acts swiftly, a substantial period of time will pass before attorneys will be reconvinced that a civil rights practice can be economically viable and before such attorneys can be reeducated to the intricacies of civil rights litigation.

I.

LIMITATIONS ON ATTORNEY'S FEES AVAILABLE TO PREVAILING PLAINTIFFS

A. *Compensable Hours*

The Supreme Court has sharply reduced attorney's fee awards by denying compensation for hours deemed excessive or redundant,¹⁸ not justified by a sufficient degree of success overall,¹⁹ or expended in related administrative proceedings.²⁰

In *Hensley v. Eckerhart*,²¹ the Court's first major ruling on the attorney's fee question subsequent to the passage of the Civil Rights Attorney's Fees Awards Act of 1976 (Section 1988), the Court endorsed the "lodestar" concept, stating that "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" is the appropriate starting point for determining the amount of a reasonable fee.²² However, reasoning that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry,"²³ the Court enumerated two types of reductions to be made in calculating the fee. First, counsel may not receive compensation for hours not "reasonably expended," *i.e.*, those hours which are "excessive, redundant, or otherwise unnecessary."²⁴ Second, the Court held that the fee award may be reduced to reflect the fact that a plaintiff was only partially successful.²⁵

The Court identified two methodologies which may be employed in reducing an attorney's fee due to partial success. Under the first method, when a plaintiff joins distinct claims for relief in a single suit and prevails on only one or some of these claims, "no fee may be awarded for services on the unsuccessful claim" if work on this claim was unrelated to work on the successful ones.²⁶ Recognizing the likely infrequency of such cases, the Court

18. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

19. *Id.* at 434-37.

20. *See Webb v. Board of Educ.*, 471 U.S. 234 (1985); *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986).

21. 461 U.S. 424 (1983).

22. *Id.* at 433. Significantly, although both Title VII and Section 1988 provide for award of "reasonable" attorney's fees, neither statute defines the term. *See Berger, supra* note 4, at 305.

23. 461 U.S. at 434.

24. *Id.* The Court equated the reduction of compensable hours to the "billing judgment" said to be exercised by attorneys in the private sector.

25. *Id.*

26. *Id.* at 434-35.

adopted an alternative reduction methodology which may be employed where the lawsuit must be viewed as a whole rather than as a discrete set of claims.²⁷ In these cases, the district court may exercise its discretion to reduce the fee to reflect a plaintiff's partial or limited success because "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."²⁸ According to the Court, "[t]his will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith."²⁹

Lower courts have not hesitated to apply *Hensley* harshly, reducing plaintiff counsel's lodestar by as much as 85%.³⁰ Some judges have culled the record carefully and made their own strict assessments of how much time was actually required for a specific task.³¹ *Hensley* has also been applied where the

27. *Id.* at 435-37.

28. *Id.* at 436.

29. *Id.*

30. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988). In *Black Grievance Committee v. Philadelphia Electric Co.*, 615 F. Supp. 1070 (E.D. Pa. 1985), plaintiff's counsel initially requested a lodestar of \$537,499. This figure reflected ten years of counsel's work in a broad pattern and practice race discrimination suit, which settled on the eve of trial. As an initial matter, the district court deducted those hours expended on issues on which plaintiff did not prevail and those hours found to be only tangentially related to the litigation. *Id.* at 1072-74. In a subsequent decision, the district court reduced the lodestar by an additional 75%, from \$293,728 to \$71,316, finding that the settlement obtained did not warrant the hours expended by plaintiff's counsel. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988). Thus, the court calculated that plaintiff's counsel was entitled to a *Hensley*-reduced lodestar of less than 15% of the amount initially requested by plaintiff.

Similarly, in *Real v. Continental Group, Inc.*, 653 F. Supp. 736 (N.D. Cal. 1987), the court reduced plaintiff's counsel's lodestar by 60% to reflect what the court perceived to be overstaffing and overlitigation of the case. The court was not moved by the fact that defense counsel had expended roughly the same number of hours as had plaintiff's counsel.

Also, in *Sas v. Trintex*, 709 F. Supp. 455 (S.D.N.Y. 1989), the court awarded plaintiff's counsel only \$7,500 of a requested \$133,144.50, on the ground that the fee sought was clearly excessive by comparison to the \$5,000 obtained by plaintiff in settlement of his claim. The court proclaimed that, in view of its theory that employment discrimination laws now cover all but white, Anglo-Saxon males in their 20's and 30's who are in good health and have only the most conventional of sexual interests and religious preferences, many "supposed" civil rights suits have little in common with the great civil rights cases of years past. Therefore, announced the court, the amount of money recovered by the plaintiff should be an important guide to the reasonableness of the attorney's fee award. *Id.* at 459. The court distinguished *City of Riverside v. Rivera*, 477 U.S. 561 (1986), a plurality decision holding that the amount of fees awarded should not be limited by the extent of the monetary relief obtained by the plaintiff, as a "true civil rights action" as opposed to the isolated discrimination involving statutory rights in *Sas*. 709 F. Supp. at 460.

See also *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1174 (6th Cir. 1990) (counsel not entitled to compensation for representing unsuccessful class members during claims process); *Carrero v. New York City Hous. Auth.*, 685 F. Supp. 904 (S.D.N.Y. 1988) (plaintiff's counsel's lodestar cut by 35% to reflect fact that plaintiff, who proved that she was victim of sexual harassment and obtained reinstatement, did not make out claim for pain and suffering, did not prevail on hostile environment theory against employer, and was not awarded punitive damages), *aff'd*, 890 F.2d 569 (2d Cir. 1989).

31. For example, in *Denny v. Westfield State College*, 50 Fair Empl. Prac. Cas. (BNA) 699 (D. Mass. 1988), *aff'd*, 880 F.2d 1465 (1st Cir. 1989), the court reduced plaintiffs' counsel's

courts have determined that there was a duplication of efforts by plaintiffs' counsel, even where duplication may have been unavoidable.³² In addition, courts have failed to provide plaintiff's counsel with their full lodestar when, in the view of the court, plaintiff's counsel failed to adequately document the fees claimed.³³

The courts also have applied *Hensley* to penalize attorneys for unsuccessful fee litigation. Generally, hours expended preparing the attorney's fee petition itself, in addition to those spent litigating the merits of the plaintiffs' claim, are compensable.³⁴ However, several courts have held that "where fee applicants do not fully succeed in recovering their fees, the fee award must be [further] reduced to reflect incomplete success on the fee award."³⁵ Thus, plaintiffs' counsel may face a dilemma when preparing their fee petition. Assuming a court might reasonably find plaintiffs' counsel entitled to a range of fees, counsel must decide whether to seek a maximum award, thereby jeopardizing full compensation for the hours they spent on the fee litigation itself, or

compensable time to reflect the court's view that the drafting of two motions for continuances should only have taken thirty minutes each and not the full hour devoted by plaintiffs' counsel. The court in *Denny* also denied plaintiffs' counsel compensation for attending two teachers' meetings which were pertinent to the case on the ground that the meetings "are not necessarily allocable to the instant lawsuit, but increased the attorneys' expertise for other cases as well." 50 Fair Empl. Prac. Cas. at 703. However, the court failed to state whether plaintiffs' counsel was actually handling other cases for which the meetings were relevant or whether the court was simply hypothesizing that such knowledge could prove useful at a future date. Nor did the court make a suggestion as to how counsel might bill a future client for such previously expended time. See also *Wooldridge*, 898 F.2d at 1177 (hours spent on particular tasks excessive).

32. *Real*, 653 F. Supp. at 736 (where a firm that represented plaintiff on the merits retained a second firm to file the fee petition, the court denied the second firm any compensation at all for the time expended on the fee petition, in part based on finding that there was necessarily some duplication of effort between the two firms); *Denny*, 50 Fair Empl. Prac. Cas. at 703 (hours claimed by plaintiffs' counsel reduced by 20% where plaintiffs failed to demonstrate that they were "scrupulous in minimizing the duplicative effort" that resulted from plaintiffs' change of counsel).

33. *E.g.*, *Wooldridge*, 898 F.2d at 1176 (compensation reduced since tasks insufficiently identified); *Carrero*, 685 F. Supp. at 904 (plaintiff's counsel denied compensation for time expended on fee petition where, although counsel submitted affidavits reconstructed from contemporaneous time records, counsel failed to submit time records themselves); *Denny*, 50 Fair Empl. Prac. Cas. at 702 (hours claimed by plaintiffs' counsel reduced by 10% to reflect court's concern that counsel failed to explain the manner in which time spent on unsuccessful claims was deleted from fee request). While the defense bar may argue that their clients sometimes force them to cut their bills in a similar fashion, they can always respond to clients' concerns with more detailed rationales or justifications for their bill. Plaintiffs' counsel is given no such opportunity. Courts simply deny plaintiffs' counsel compensation for hours deemed insufficiently documented, without giving counsel an opportunity to provide fuller documentation.

34. *See, e.g.*, *Jensen v. Stangel*, 790 F.2d 721, 722 (9th Cir. 1985); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 925 (3d Cir. 1985).

35. *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1455 (3d Cir. 1988); *see also In re Burlington Northern, Inc. Employment Practices Litigation*, 832 F.2d 430 (7th Cir. 1987). *But see* *Commissioner, INS v. Jean*, 110 S. Ct. 2316 (1990) (fees can be recovered for hours spent litigating fees under Equal Access to Justice Act, even where government was "substantially justified" in contesting fees); *Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984) (plaintiff entitled to recovery of full fees on appeal where, although not entirely successful, all issues raised on appeal were closely interrelated).

whether to submit a more modest request for fees, which decreases the likelihood of *Hensley* being applied to further reduce their award.³⁶

Fortunately, not all courts have applied the *Hensley* reducer to prevent plaintiffs' counsel from obtaining compensation for all of the hours expended during representation of their client.³⁷ Moreover, several appellate courts have held that lower courts may not apply the *Hensley* reducer in a strict mathematical fashion based on either the number of claims on which plaintiff prevailed or the percentage of defendants against whom plaintiff obtained a settlement or judgment.³⁸ Nevertheless, *Hensley's* bottom line is that an attorney who has "reasonably" spent hundreds, and often thousands, of hours on a particular case and has obtained a jury verdict for her client, may end up being compensated for just a small portion of her time. Unless she can adjust the hourly rate or obtain a multiplier on the award, the attorney will have to suffer the loss.

Two years after *Hensley*, in *Webb v. Board of Education*,³⁹ the Supreme Court held that Section 1988 does not contemplate an award of attorney's fees for hours spent on administrative proceedings prior to the filing of a complaint unless the plaintiff can demonstrate that "any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation."⁴⁰

In *Webb*, a terminated tenured elementary school teacher retained counsel to represent him in his claim of unlawful discharge. The plaintiff initially sought administrative relief based on a Tennessee statute permitting the dis-

36. Plaintiffs' counsel must also be wary with regard to the manner in which they submit their fee petition. One court has held that where an attorney failed to secure his client's approval prior to filing an appeal from the district court's denial of attorney's fees, the appeal should be dismissed. *Soliman v. Ebasco Servs. Inc.*, 822 F.2d 320 (2d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988).

37. *See, e.g.*, *Cunningham v. County of Los Angeles*, 879 F.2d 481 (9th Cir. 1988) (district court, having previously reduced lodestar from approximately \$30,000 to \$12,000, erred in reducing fees further based on plaintiff's purported lack of success), *cert. denied*, 110 S. Ct. 757 (1990); *Fite v. First Tenn. Prod. Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988) (plaintiff entitled to compensation for hours unsuccessfully spent litigating aspect of case where plaintiff received excellent results overall and where time spent on unsuccessful issues was sufficiently related to time spent on successful issues); *Norwood v. Charlotte Memorial Hosp. and Medical Center*, 720 F. Supp. 543 (W.D.N.C. 1989) (no reduction of lodestar required where, although plaintiffs prevailed on only eleven of thirty-seven claims, plaintiffs successfully brought pervasive race discrimination to an end); *Lenihan v. City of New York*, 640 F. Supp. 822 (S.D.N.Y. 1986) (plaintiff awarded fees for all of counsel's hours where, although plaintiff did not obtain all relief sought, her claims involved common core of facts and counsel devoted little time to remedies issue).

38. *See, e.g.*, *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 654 (3d Cir. 1986) (rejecting defendant's claim that *Hensley* multiplier must be calculated by making a mechanical comparison between claims alleged by plaintiffs in pretrial memorandum and relief obtained in consent decree), *vacated*, 483 U.S. 1015 (1987); *Cunningham*, 879 F.2d at 485 ("courts may not adopt rigid mathematical formulas tying the lodestar figure to the ratio of defendants remaining at trial to defendants served in the complaint").

39. 471 U.S. 234 (1985).

40. *Id.* at 243.

charge of public school teachers for specific causes only.⁴¹ Following a series of hearings before the Dyer County Board of Education and the breakdown of settlement negotiations, Webb filed suit in 1979 alleging violation of various federal civil rights statutes.⁴² In 1981 the parties settled. Webb obtained a consent order awarding him \$15,400 in damages and an agreement that he would be reinstated and then treated as having resigned.⁴³ The question of attorney's fees was reserved for a future court ruling. Plaintiff's counsel subsequently requested a total fee of \$21,165, including an upward adjustment of 25%,⁴⁴ for 141.1 hours of work, 82.8 of which were attributed to the administrative proceedings.⁴⁵

Plaintiff argued that the time spent on the administrative proceedings was compensable "on either of two theories: (1) that those hearings were 'proceeding[s] to enforce a provision of [§ 1983]' within the meaning of § 1988; or (2) that the time was 'reasonably expended' in preparation for the court action and therefore compensable under the rationale of *Hensley v. Eckerhart*."⁴⁶ The Supreme Court considered and rejected both theories.⁴⁷ In denying compensation under the first theory, the Court contrasted Section 1983 with Title VII, pointing out that whereas Title VII "expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum[,] [t]here is no comparable requirement in § 1983."⁴⁸ Therefore, ruled the Court, although hours spent on administrative proceedings in Title VII actions had been held compensable in *New York Gaslight Club, Inc. v. Carey*,⁴⁹ Sections 1983 and 1988 required no similar result.⁵⁰ The Court also rejected Webb's second theory, holding that because "[t]he petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement,"⁵¹ plaintiff could not show that the disputed hours were spent "on the litigation" and thus compensable.⁵²

41. See *id.* at 236-37.

42. See *id.* at 237. Plaintiff sought relief under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 (1982).

43. See 471 U.S. at 237.

44. Counsel requested upward adjustment "in light of the peculiar difficulties involved in this . . . case and the unusual nature of the hours involved in the Board proceedings." *Id.* at 238.

45. See *id.* at 238 n.6.

46. *Id.* at 240 (alteration in original) (citation omitted).

47. *Id.* at 240-44.

48. *Id.* at 240 (footnote omitted). Rather, the Court has specifically held that no exhaustion is required under Section 1988. *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

49. 447 U.S. 54, 71 (1980).

50. 471 U.S. at 240-41.

51. *Id.* at 243. Applying this rationale in *Lenihan v. City of New York*, a Title VII and Section 1983 action, the court awarded plaintiff's counsel fees for time spent representing plaintiff before the city's fair employment agency and before the EEOC, but not for time spent representing plaintiff before a medical board. 640 F. Supp. 822, 830-31 (S.D.N.Y. 1986).

52. 471 U.S. at 243.

In 1986, the Court expanded on *Webb*, ruling in *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*⁵³ that a party cannot bring suit to recover attorney's fees under Section 1988 unless the party filed a complaint in court, rather than administratively, seeking enforcement of the statute. In *Crest*, plaintiffs challenged construction of a proposed highway under Title VI of the Civil Rights Act of 1964.⁵⁴ Plaintiffs filed their complaint with the Department of Transportation,⁵⁵ as is permitted under Title VI and the accompanying regulations,⁵⁶ and obtained substantial relief through a settlement without ever reaching federal court.⁵⁷ Subsequently, plaintiffs filed a petition for fees which was denied by the district court⁵⁸ but granted by the appeals court.⁵⁹ On certiorari, the Supreme Court reversed, stating that "[t]he legislative history [of Section 1988] clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit."⁶⁰ The Court explained "[i]t is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court."⁶¹ A vigorous three Justice dissent disputed the majority's interpretation of the legislative history,⁶² warning that the practical incentives created by the Court's decision would be counterproductive.⁶³

In *Hewitt v. Helms*,⁶⁴ the Court further limited the circumstances under which plaintiffs' attorneys could be compensated by ruling that a plaintiff who obtained a favorable statement of law from the court but no other judicial relief was not a "prevailing party" entitled to attorney's fees.⁶⁵ Helms, a prison inmate, brought suit under Section 1983 challenging administrative dis-

53. 479 U.S. 6 (1986).

54. 42 U.S.C. §§ 2000d to 2000d-1 (1988). Plaintiffs argued that the proposed highway would disrupt a predominantly black community and was, therefore, discriminatory on the basis of race.

55. See 479 U.S. at 9.

56. See 49 C.F.R. § 21.11(b) (1989).

57. See 479 U.S. at 10.

58. *Crest St. Community Council, Inc. v. North Carolina Dep't of Transp.*, 598 F. Supp. 258 (M.D.N.C. 1984).

59. *Crest St. Community Council, Inc. v. North Carolina Dep't of Transp.*, 769 F.2d 1025 (4th Cir. 1985). Complainants' counsel "had spent more than 1,200 hours over the course of five years on this project, preparing the administrative complaint, assisting the DOT investigation, actively participating in negotiations to resolve the dispute, and informing DOT on the progress of those negotiations." 479 U.S. at 10.

60. *Id.* at 14.

61. *Id.*; see *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985) (plaintiff must demonstrate that the hours she expended administratively were "useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement").

62. 479 U.S. at 16 (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.).

63. *Id.* at 23. The dissent argued that the Court's ruling would induce complainants to file otherwise unnecessary suits in federal court simply to protect any possible claim for attorney's fees.

64. 482 U.S. 755 (1987).

65. *Id.* at 759-60.

cipline which had been levied against him.⁶⁶ The court of appeals held that the defendant prison officials had violated Helms' due process rights,⁶⁷ but remanded the matter for determination of whether the officials named in the action were immune from a damages action.⁶⁸ On remand, the district court ruled against the plaintiff, finding that the relevant officials were immune, and the court of appeals affirmed.⁶⁹ Plaintiff appealed, requesting, *inter alia*, injunctive relief.⁷⁰ While the appeal was pending, the Pennsylvania Bureau of Corrections voluntarily revised its regulations to include certain provisions responsive to plaintiff's suit.⁷¹

Helms sought fees arguing that he had obtained relief from both the circuit court's decision and from the bureau's voluntary amendment of its regulations.⁷² The court of appeals granted Helms attorney's fees,⁷³ and the Supreme Court reversed, holding that no official declarative relief had been awarded, and that the voluntary amendment did not benefit Helms because he previously had been released from his original prison term.⁷⁴ The Court reasoned that because the plaintiff was not in prison at the time of the amendment, he could not be considered a prevailing party.⁷⁵ As a consequence, the attorney who represented Helms received no fees under Section 1988.

Finally, in *Independent Federation of Flight Attendants v. Zipes*,⁷⁶ the Court further limited compensable hours, ruling that prevailing plaintiffs may not recover fees against intervening third parties unless they can show that the

66. Specifically, Helms had been placed in administrative segregation pending an investigation into his possible role in a prison riot. More than seven weeks later, a prison hearing committee, relying solely on an officer's report of the testimony of an undisclosed informant, found Helms guilty of misconduct for striking a corrections officer during the riot. Helms, sentenced to six months of restrictive confinement, argued that his due process rights had been violated. *See id.* at 757.

67. *Helms v. Hewitt*, 655 F.2d 487 (3d Cir. 1981). The court found both the initial confinement without a hearing and the conviction based solely on the uncorroborated report of an unidentified informant violated Helms' due process rights.

68. Before a remand hearing could be held on the immunity issue, the Supreme Court granted certiorari in *Hewitt v. Helms*, 455 U.S. 999 (1982), to determine whether the administrative segregation violated Helms' due process rights and concluded it did not. The Court did not, however, set aside the Third Circuit's ruling that Helms' due process rights were violated by his misconduct conviction. *Hewitt v. Helms*, 459 U.S. 460 (1983).

69. *Helms v. Hewitt*, 745 F.2d 46 (3d Cir.), *aff'g* mem. grant of summary judgment (M.D. Pa. 1984).

70. Plaintiff sought expungement of his misconduct conviction.

71. *See* 482 U.S. at 759. Specifically, Directive 801 was adopted, establishing "for the first time procedures for the use of confidential-source information in inmate disciplinary proceedings."

72. *See id.* at 759-64.

73. *Helms v. Hewitt*, 780 F.2d 367 (3d Cir. 1986).

74. 482 U.S. at 760-64. The dissent, by contrast, argued that if Helms could show on remand that his actions had catalyzed the issuance of Directive 801, he would be entitled to recover attorney's fees. *Id.* at 764-69 (Marshall, J., dissenting).

75. *Id.* at 763-64. The dissent, however, rejected the argument that Helms' release from prison in any way mooted his claims for expungement of records or for a declaration that his due process rights had been violated. *Id.* at 763 n.1.

76. 109 S. Ct. 2732 (1989).

intervenor's action was "frivolous, unreasonable, or without foundation."⁷⁷ The plaintiffs in *Zipes*, female flight attendants of Trans World Airlines [hereinafter TWA], brought an action against TWA in 1970 claiming that the airline's policy of terminating flight attendants who became mothers constituted sex discrimination in violation of Title VII. After eight years of litigation, plaintiffs prevailed on the merits,⁷⁸ and then reached a settlement providing them with both monetary relief and full company and union "competitive" seniority from the date of termination.⁷⁹

At the same time, the Independent Federation of Flight Attendants sought permission to intervene in the suit to represent the interests of flight attendants who would not benefit under the settlement reached between plaintiffs and TWA.⁸⁰ The Federation's arguments, hard fought by plaintiffs' counsel, were ultimately rejected by the district court,⁸¹ the court of appeals,⁸² and the Supreme Court.⁸³

Plaintiffs then filed a petition for an award of attorney's fees and costs against both TWA and the Federation. The district court, having previously awarded fees from the settlement fund against TWA, also awarded plaintiffs \$180,915.84 against the Federation.⁸⁴ The court of appeals affirmed the award.⁸⁵

The Supreme Court, however, reversed the award of fees against the intervenor Federation.⁸⁶ The Court found that "[a]lthough the text of [Title VII] does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits."⁸⁷ Looking to the "large objectives" of the Act, the Court announced a rule that plaintiffs may obtain fees against an intervenor only where they can establish the intervenor's actions were "frivolous, unreasonable, or without foundation."⁸⁸ It based this rule on the rationale that "losing intervenors like petitioner have not been found to have violated anyone's civil rights," and stated that awarding fees against blameless intervenors "would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices."⁸⁹

77. *Id.* at 2736.

78. *In re* Consol. Pretrial Proceedings in Airline Cases, 582 F.2d 1142, 1144 (7th Cir. 1978).

79. *See* 109 S. Ct. at 2734.

80. *See id.*

81. *See id.*

82. *Air Line Stewards and Stewardesses Ass'n Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980).

83. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

84. *Airline Stewards and Stewardesses Ass'n Local 550 v. Trans World Airlines, Inc.*, 640 F. Supp. 861, 867 (N.D. Ill. 1986).

85. *Zipes v. Trans World Airlines, Inc.*, 846 F.2d 434 (7th Cir. 1988).

86. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989).

87. *Id.* at 2735.

88. *Id.* at 2736.

89. *Id.* at 2737. The Court further stated that given its decision in *Martin v. Wilks*, 109 S.

The *Zipes* decision, if uncorrected by legislation, will have a serious detrimental effect on civil rights litigants. Under *Zipes*, even after plaintiffs have succeeded in their battle against a discriminatory defendant, they can be forced to defend the judgment or settlement, with no hope of court-awarded fees, in a second battle against an intervenor. The facts of *Zipes* itself demonstrate that such battles may often be both lengthy and very costly. The *Zipes* plaintiffs spent three years and nearly \$200,000 successfully defending the settlement they had obtained at the district court, court of appeals, and Supreme Court levels.⁹⁰ As Justices Marshall and Brennan pointed out in their dissent, this result is antithetical to Title VII's goal of making whole the victims of discrimination.⁹¹ Whereas the majority seemed to assume that the fees a plaintiff may obtain from a defendant will be sufficient to fund any subsequent litigation against intervenors,⁹² in fact *Zipes* will force plaintiffs and their attorneys to fend off the intervenors at their own expense.⁹³ The decision will, inevitably, deter civil rights litigation.

Taken together, the Court's decisions in *Hensley*, *Webb*, *Crest*, *Hewitt* and *Zipes* provide that even where plaintiffs' counsel are successful in civil rights litigation, they cannot be certain of receiving full compensation for all hours expended on litigation. Rather, they can expect that their compensable hours will be severely cut back to the extent the court perceives that they were expended on issues on which the plaintiff did not prevail, on administrative proceedings, on matters the courts view as superfluous or duplicative, or on issues litigated against intervenors. Insofar as defense attorneys and plaintiffs' attorneys in non-civil rights cases face no similar restrictions on recovering fees, plaintiffs' civil rights counsel will be undercompensated vis-à-vis their counterparts, unless they can overcome this discrepancy by charging higher hourly rates or by obtaining an offsetting multiplier.⁹⁴ As the next sections show, neither of these tactics is a viable option for plaintiffs' counsel.

Ct. 2180 (1989), holding that a party affected by a Title VII decree may attack the decree collaterally, plaintiffs would still face the prospect of litigating against such collateral attacks without compensation. *Zipes*, 109 S. Ct. at 2736-37.

90. *Zipes*, 109 S. Ct. at 2741.

91. *Id.* at 2742 (Marshall, J., dissenting, joined by Brennan, J.) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

92. *Id.* at 2743.

93. Justice Blackmun in his concurrence suggested that plaintiffs ought to be able to recover additional fees against the original defendant to compensate them for the hours they have expended seeking to protect their judgment or settlement from attack by an intervenor. *Id.* at 2740. However, this position was not adopted by any other Justice, nor is it likely to be adopted by lower courts. Moreover, Justice Blackmun's solution appears impractical. Defendants will not likely settle cases if they face the prospect of unknown fee claims due to issues raised by third parties. Nor does it seem fair to burden a settling defendant with the fees arising from battles between plaintiff and a third party. Nonetheless, Justice Blackmun's approach has been incorporated into one of the fee provisions of the proposed Civil Rights Act of 1990. See *infra* text accompanying notes 485-87.

94. See generally Leubsdorf, *supra* note 4 (discussing alternative mechanisms which may be applied to offset contingent aspect of plaintiffs'-side civil rights litigation).

B. Compensable Rates

The Supreme Court first provided guidance on calculating the "reasonable hourly rate" to which prevailing plaintiffs' attorneys were entitled in *Blum v. Stenson*.⁹⁵ In *Blum*, the Court unanimously held that although plaintiffs had been represented by The Legal Aid Society of New York, plaintiffs' counsel were entitled to be compensated at "prevailing market rates,"⁹⁶ and not merely at the Legal Aid Society's presumably lower rates.⁹⁷ Reviewing the legislative history of Section 1988, the Court concluded that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."⁹⁸ While noting that "determining an appropriate 'market rate' for the services of a lawyer is inherently difficult,"⁹⁹ the Court attempted to establish a framework to guide the district courts in making this determination. Observing that "the rates charged in private representations may afford relevant comparisons,"¹⁰⁰ the Court noted that there is great variance between "[t]he type of services rendered by lawyers, as well as their experience, skill and reputation."¹⁰¹ Therefore, explained the Court, the ultimate "burden is on the fee applicant to produce satisfactory evidence — in addition to the attorney's own affidavits — that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."¹⁰²

95. 465 U.S. 886 (1984).

96. *Id.* at 895.

97. *Id.* at 892.

98. *Id.* at 894.

99. *Id.* at 895 n.11.

100. *Id.* at 896 n.11. The Court did not clearly define which "private representations" are relevant for comparative purposes. Thus, some courts attempt to determine appropriate rates by looking at the rates charged by other civil rights plaintiffs' attorneys. See *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987) (looking to rates charged in Title VII cases); *Mayson v. Pierce*, 806 F.2d 1556, 1557-58 (11th Cir. 1987) (per curiam) (reducing attorney's rate to conform with market for Title VII work); *Coulter v. Tennessee*, 805 F.2d 146, 148-50 (6th Cir. 1986) (fees awarded based on community rate for Title VII cases), *cert. denied*, 482 U.S. 914 (1987).

Other courts, adopting a view more consistent with the Supreme Court's language in *Blum* and with the legislative history of Section 1988, have determined reasonable rates by looking to those charged by comparably qualified and experienced attorneys who handle other complex federal litigation. See *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1450 (3d Cir. 1988); *Hall v. Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987); *Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir.), *cert. denied*, 484 U.S. 990 (1987); see also *Save Our Cumberland Mountains Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc) (courts must determine rates by looking to those prevailing in community to ensure availability of competent counsel).

101. 465 U.S. at 895 n.11.

102. *Id.* at 896 n.11. Where courts find that the rates requested by plaintiff's counsel exceed those prevailing in the community, they will not hesitate to cut the hourly rates. For example, in *Denny v. Westfield State College*, 50 Fair Empl. Prac. Cas. (BNA) 699 (D. Mass.), *aff'd*, 880 F.2d 1465 (1st Cir. 1989), the court held that plaintiffs' counsel were permitted to be compensated for their travel time at the rate of only \$40 per hour. Apparently the court mistakenly believed that defense firms billed such time at that rate. See also *Coulter*, 805 F.2d at

However, in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*,¹⁰³ the Court cut back sharply on the rates available to compensate prevailing plaintiffs' attorneys. The Court reasoned that fee-shifting statutes were "not intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his clients."¹⁰⁴ Explaining that the statutes require only that rates be set so as to enable persons to obtain legal help, the Court concluded that "if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied."¹⁰⁵

It is difficult to reconcile the Court's language in *Delaware Valley I* with *Blum's* edict that reasonable fees are to be determined by comparison to prevailing rates in the community.¹⁰⁶ A "reasonable" rate now seems to mean the lowest rate the market will bear.¹⁰⁷ Apparently the Court now believes that prevailing rates generally constitute an upper limit in the determination of a "reasonable" rate, and that the "reasonable" rate may be lower than the prevailing rate so long as it is sufficient to attract an attorney.¹⁰⁸ Significantly, nowhere in *Delaware Valley I* does the Court address the issue of what quality of lawyer will be attracted by the lowest rate the market will bear.

Moreover, under the Equal Access to Justice Act,¹⁰⁹ which applies to

149 ("[reasonable hourly rates are] different from the prices charged to well-to-do clients by the most noted lawyers in a region. Under these [fee-shifting] statutes, a renowned lawyer who customarily receives \$250 an hour in a field in which competent and experienced lawyers in the region normally receive \$85 an hour should be compensated at the lower rate"); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (reducing hourly rate of nationally renowned constitutional scholar Professor Laurence Tribe from \$275 per hour to \$175 per hour, based on analysis of rates prevailing in Boston legal market); *Richards v. New York City Bd. of Educ.*, 50 Fair Empl. Prac. Cas. (BNA) 837 (S.D.N.Y. 1988) (attorney who requested compensation at rate of \$275 per hour instead provided with rate of \$185 per hour for in-court work and \$100 per hour for out-of-court work); *Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988) (although plaintiffs' counsel had successfully demonstrated that their own standard rates were unreasonably low, falling far below the lowest rates charged in the community for representation in complex federal litigation, counsel was entitled to compensation only at the minimum market rate, not the average rate); *Real v. Continental Group, Inc.*, 653 F. Supp. 736 (N.D. Cal. 1987) (holding that maximum rate chargeable by plaintiff's counsel was \$145 per hour, which was rate charged by one of plaintiff's lower priced attorneys); *Lenihan v. City of New York*, 640 F. Supp. 822 (S.D.N.Y. 1986) (lead counsel fee reduced from \$200 to \$180 per hour, associate fee reduced from \$80 to \$75 per hour).

103. 478 U.S. 546 (1986) [hereinafter *Delaware Valley I*].

104. *Id.* at 565.

105. *Id.*

106. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

107. *See supra* note 104. Several courts have explicitly ruled that where a firm's regular rates are lower than those prevailing in the market, the firm is nonetheless limited to its own rates, even if those rates were discounted to assist plaintiffs in the case at bar. The District of Columbia Circuit so held in *Save Our Cumberland Mountains, Inc. v. Hodel*, but then reversed itself in a subsequent decision holding that counsel are entitled to rates prevailing in community for similar work, and not merely to their own lower rates. 857 F. 2d 1516, 1521-24 (D.C. Cir. 1988) (en banc), *vacating* 826 F.2d 43 (D.C. Cir. 1987).

108. *Delaware Valley I*, 478 U.S. at 565.

109. Pub. L. No. 99-80, 99 Stat. 186 (1985) (codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412 (1988)) [hereinafter *EAJA*].

civil rights suits brought by and against the federal government, plaintiffs' counsel's permissible hourly rates may be sharply limited. The Act provides: "attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."¹¹⁰ The Supreme Court's decision in *Pierce v. Underwood*,¹¹¹ reversing the district court's award of fees in excess of \$75 per hour, ensures that plaintiffs' counsel will have a very difficult time justifying a higher fee.¹¹² According to the Court, the language of the EAJA demonstrates that Congress "thought that \$75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be."¹¹³ In order to obtain a higher fee, the Court held, an attorney must show that she exercised some narrow and specialized skill not required of other lawyers.¹¹⁴ Consequently, an attorney cannot realistically use a higher hourly rate to set off the loss she will incur as a result of the courts' limitations on number of compensable hours. The only other mechanism theoretically available to her is enhancement of the lodestar.

C. Adjustment of the Lodestar

Recognizing that the lodestar does not necessarily yield an appropriate attorney's fee, the Court in *Hensley* posited that an "enhanced" award may be appropriate in certain circumstances, such as where plaintiffs have met with "exceptional success."¹¹⁵ The Court's subsequent decisions, however, have sharply limited the types of enhancers which may be awarded and the circumstances under which they may be provided. The lodestar may not be enhanced to reflect the novelty and complexity of the issues involved in the case.¹¹⁶ Only in the rarest of circumstances may the lodestar be enhanced due to either the superior quality of representation or the exceptional success obtained.¹¹⁷ While the Court has deemed it appropriate to enhance the lodestar

110. 28 U.S.C. § 2412(d)(2)(A)(ii) (1988).

111. 487 U.S. 552 (1988).

112. See *Headlee v. Bowen*, 869 F.2d 548, 552 (10th Cir.) (deference is due district court's decision that \$75 per hour is reasonable fee under the EAJA), *cert. denied*, 110 S. Ct. 507 (1989).

The Court in *Pierce* also made it more difficult for plaintiffs' counsel to collect any fees whatsoever under the EAJA. The EAJA provides that a plaintiff may not recover fees if the government's position was "substantially justified." 28 U.S.C. § 2412(d). The Supreme Court interpreted this phrase to mean "justified to a degree that could satisfy a reasonable person," and not "justified to a high degree." 487 U.S. at 565. The Court ruled that a position can be reasonably justified even if it is incorrect. *Id.* at 566 n.2.

113. 487 U.S. at 572.

114. The Court specified that a higher fee is not justified by the mere novelty and difficulty of the issues, the undesirability of the case, the work and ability of counsel, the results obtained, nor the contingent nature of the litigation. *Id.*

115. *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983).

116. *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984).

117. *Id.*

to reflect delays in plaintiffs' counsel's receipt of compensation, it has not specified how this calculation should be made.¹¹⁸ Finally, although courts may also enhance the lodestar to reflect the contingent nature of civil rights litigation, plaintiffs will likely have difficulty meeting the evidentiary burden courts may impose to obtain such an enhancement.¹¹⁹ These types of enhancers are discussed below.

1. *Novelty and Complexity of Issues*

In *Blum v. Stenson*,¹²⁰ the district court had increased the lodestar by 50% based on "the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class,' that was achieved."¹²¹ Although the Supreme Court considered these issues, it rejected any enhancement based on the record submitted by plaintiffs.¹²² The Court ruled that "novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates."¹²³

2. *Superior Quality of Representation*

The Supreme Court has twice stated that an enhancement for "superior quality of representation" should be provided, if at all, only in the rarest of circumstances.¹²⁴ Addressing the question first in *Blum*, the Court stated that although "quality of representation" is normally reflected in the reasonable hourly rate, quality may justify an upward adjustment "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"¹²⁵ In the Court's view, the plaintiffs in *Blum* had failed to make such a showing.¹²⁶

Likewise, in *Delaware Valley I*, the Court rejected plaintiffs' counsel's proposed enhancement as unsupported by the evidence.¹²⁷ The Court emphasized the strong presumption that the lodestar figure itself represents a reasonable fee and should not generally be enhanced for superior performance.¹²⁸ The Court stated: "In short, the lodestar figure includes most, if not all, of the

118. *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989).

119. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 730-31 (1987) [hereinafter *Delaware Valley II*].

120. 465 U.S. 886 (1984).

121. *Id.* at 891 (citing *Stenson v. Blum*, 512 F. Supp. 680, 685 (S.D.N.Y.), *aff'd*, 671 F.2d 493 (2d Cir. 1981)).

122. *Id.* at 901-02.

123. *Id.* at 898.

124. *Id.* at 899; *Delaware Valley I*, 478 U.S. 546, 565 (1986).

125. 465 U.S. at 899 (citations omitted).

126. *Id.*

127. 478 U.S. at 562, 567.

128. *Id.* at 565.

relevant factors comprising a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance."¹²⁹

Given the Court's rulings in *Blum* and *Delaware Valley I*, it appears highly unlikely that superior performance will provide the basis for many future enhancement awards.¹³⁰

3. Results Obtained

In *Hensley*, the Court recognized that the results obtained could, "in some cases of exceptional success,"¹³¹ justify an enhanced award of the basic lodestar figure. However, in *Blum* the Court restricted the use of this enhancer, stating that "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award."¹³² The Court held that the benefits obtained by plaintiffs were insufficient to support any part of the 50% enhancement awarded by the district court.¹³³ Given this result, it seems unlikely that many plaintiffs will be able to realize an enhancement based on the extensive benefits they obtained.¹³⁴

4. Contingency

In *Delaware Valley II*,¹³⁵ the Supreme Court finally faced the question it had avoided in earlier cases: whether prevailing plaintiffs in civil rights litigation can recover a contingency multiplier as compensation for the risk undertaken by litigating cases in which recovery of fees is merely speculative.¹³⁶ In

129. *Id.* at 566.

130. *Compare* *Palmer v. Shultz*, 679 F. Supp. 68, 72 (D.D.C. 1988) (plaintiffs' request for quality enhancement withdrawn, in view of *Delaware Valley I* and in view of court's raising of counsels' rates to minimum prevailing in the community) with *McKenzie v. Kennickell*, 875 F.2d 330, 338-39 (D.C. Cir. 1989) (awarding plaintiffs' counsel quality enhancement for "care" in this "exceptional" case where representation was "performed in a manner worthy of much higher rates").

131. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

132. *Blum v. Stenson*, 465 U.S. 886, 900 (1984).

133. *Id.*

134. Such enhancements have, however, been awarded by a few courts. See, e.g., *In re Lawler*, 807 F.2d 1207 (5th Cir. 1987); *Clayton v. Thurman*, 775 F.2d 1096 (10th Cir. 1985); *Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983), *aff'd sub nom. Venegas v. Mitchell*, 110 S. Ct. 1679 (1990).

135. 483 U.S. 711 (1987). See generally *Leading Cases*, *supra* note 1, at 290-300 (analyzing decision in *Delaware Valley II*).

136. The Supreme Court had failed to rule on this question in *Delaware Valley I*, 478 U.S. 546 (1986). The issue of contingency has been widely discussed by commentators. See generally F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964); H. NEWBERG, *supra* note 1, at ch. 4 (discussing need for incentives, especially to prompt small firms to take contingent fee cases, and discussing possible types of proof in contingent fee cases); Clermont & Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978) (proposing payment by both contingent fees and an hourly component); Leubsdorf, *supra* note 4 (advocating a uniform 100% contingency enhancement); Report of the Third Circuit Task Force, *supra* note 4 (arguing contingency always exists and should always be awarded); See, *An Alternative to the*

a 4-1-4 split, the Court held that contingency multipliers are available in certain situations, but denied the multiplier to plaintiffs in the case at bar.¹³⁷ Given the split nature of the Court's decision, assessment of the holding on this key issue requires analysis of the plurality decision as well as Justice O'Connor's concurrence and Justice Blackmun's dissent.¹³⁸

The four members of Justice White's plurality, while recognizing that most appellate courts had allowed contingency multipliers,¹³⁹ nonetheless concluded that the use of "multipliers or other enhancement of a reasonable lode-star fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes."¹⁴⁰ Reviewing the decisions of various courts of appeals,¹⁴¹ the writings of legal commentators,¹⁴² and the legislative history of both the Clean Air Act and Section 1988,¹⁴³ the White plurality reasoned that contingency multipliers are generally unnecessary and that their award would create numerous evils.

In particular, the White plurality, with Justice O'Connor in concurrence, identified four "major problems with the use of [the contingency factor]."¹⁴⁴ First, "evaluation of the risk of loss creates a potential conflict of interest between an attorney and his client" because plaintiff's counsel is forced to expose the weaknesses in the plaintiff's case and defense counsel is forced to

Contingent Fee, 1984 UTAH L. REV. 485 (suggesting that a "risk enhanced hourly fee" is preferable to the traditional contingent fee arrangement); Comment, *supra* note 4 (advocating for the Supreme Court to determine the contingency multiplier issue); *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318 (1976) (arguing that certain environmental cases are so risky that even unsuccessful but reasonable plaintiffs should be compensated); *Leading Cases*, *supra* note 1, at 291 (noting controversial nature of contingency question).

137. 483 U.S. at 730.

138. *Id.* at 713 (White, J., plurality opinion, joined by Rehnquist, C.J., Powell & Scalia, JJ.); *id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 735 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.).

139. *Id.* at 716.

140. *Id.* at 727.

141. The plurality candidly cited cases from virtually every circuit supporting the award of a contingency multiplier. *Id.* at 717-18 & n.4. The plurality also cited decisions of the Seventh Circuit and the District of Columbia Circuit, as well as various district court decisions, opposing the grant of contingency multipliers. *Id.* at 716-20 & nn.4 & 6; *see, e.g.,* McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984).

142. The White plurality cited two articles discussing the problems with contingency multipliers: Leubsdorf, *supra* note 4, at 483, 486, 488-91, and Note, *Promoting Vindication*, *supra* note 4, at 375. 483 U.S. at 721-24.

The White plurality also recognized that a number of legal commentators endorse the concept of a contingency multiplier. *Id.* (citing Berger, *supra* note 4, at 324-25; *Developments in the Law — Class Actions*, *supra* note 136, at 1615; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 708-11 (1974); Rowe, *supra* note 4, at 676).

143. 483 U.S. at 723.

144. *Id.* at 721. Justice O'Connor expressly concurred in Part III-A of the White plurality decision, which is the section addressing the "four major problems." *Id.* at 724. Justice O'Connor also agreed that "without guidance as to the trial court's exercise of discretion, adjustment for risk could result in 'severe difficulties and possible inequities.'" *Id.* at 733 (quoting the plurality opinion, *id.* at 728).

identify the strengths in the plaintiff's case.¹⁴⁵ Second, it is very difficult to assess a party's likelihood of success, particularly in hindsight.¹⁴⁶ Third, a contingency enhancer is said to penalize the defendant with the strongest defense, forcing her to subsidize plaintiff's attorney for bringing other unsuccessful actions.¹⁴⁷ Fourth, the contingency enhancement is said to remove a client's incentive for ensuring that the litigation is handled as economically as possible, shifting the burden of determining whether the case has been handled economically to the judge.¹⁴⁸

The White plurality further concluded, this time without Justice O'Connor, that although a fundamental aim of the attorney's fee statutes is "to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, . . . it does not follow that fee enhancement for risk is necessary or allowable."¹⁴⁹ Rather, such enhancement is not necessary where plaintiffs can afford to pay an attorney, where plaintiffs have a damages case which would support contingent fee litigation, where plaintiffs can secure help from public interest organizations, or where there exist in the market competent attorneys "whose time is not fully occupied by other matters."¹⁵⁰ Thus, according to the plurality, contingency enhancement is necessary only in those cases in which "the damages likely to be recovered are not sufficient to provide adequate compensation to counsel, as well as those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages."¹⁵¹

Although the plurality seemingly recognized the need for contingency enhancement in at least certain classes of cases, it blithely concluded that a contingency enhancement may well be "superfluous and unnecessary under the lodestar approach."¹⁵² According to the plurality, the skill and experience which permitted the attorney to prevail are factors considered by a court in determining the reasonable hours and hourly rate which make up the lodestar.¹⁵³ Therefore, awarding a contingency enhancement would result in a windfall to the prevailing attorney.¹⁵⁴

145. *Id.* at 721-22.

146. *Id.* at 722.

147. *Id.*

148. *Id.*

149. *Id.* at 725-26.

150. *Id.* at 726.

151. *Id.*

152. *Id.*

153. *Id.*

154. Congress expressed concern that statutory attorney's fee awards should not result in windfalls. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908; H.R. REP. NO. 1558, 94th Cong., 2d Sess. 9 (1976), reprinted in E. LARSON, *supra* note 4, at 288-312.

The Court cited approvingly to a windfall analysis employed by a Georgia district court. 483 U.S. at 727 (citing *Cherry v. Rockdale County*, 601 F. Supp. 78 (N.D. Ga. 1984)). The Georgia court had examined nationwide statistics on attorneys' earnings and concluded that so long as an attorney billed 2,000 hours annually and won two-thirds of her cases, no contingency enhancement would be necessary. The court recognized that if the attorney won only one-half

Justice O'Connor's concurring opinion provided the fifth vote in support of the majority's denial of fees to plaintiffs. Unlike the four members of the White plurality, however, Justice O'Connor concluded that contingency multipliers may properly be awarded where a plaintiff can show that they are based on the market's treatment of contingency as a class, and that fee enhancement is necessary to attract competent counsel.¹⁵⁵ Her opinion provides the narrowest rationale for the plurality's disposition, which, because she cast the crucial fifth vote, constitutes the Court's holding.¹⁵⁶

Justice Blackmun, writing for a four-member dissent, viewed the appropriateness of contingency enhancers quite differently.¹⁵⁷ Citing legislative history of the Clean Air Act and Section 1988, numerous scholarly books and articles, and lower court decisions,¹⁵⁸ the dissent explained that "a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case may be inadequate and inappropriate when its payment is contingent upon winning the case."¹⁵⁹ The dissent asserted that "[b]y not allowing an upward adjustment for a case taken on a contingent basis, the plurality undermines the basic purpose of statutory attorney fees — ensuring that 'private citizens . . . have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.'"¹⁶⁰ Far from providing a windfall to prevailing plaintiffs, the dissent explained, the grant of a contingency enhancer is essential to permit attorneys to collect a "reasonable" fee.¹⁶¹

As for the method of calculating contingency multipliers, the Blackmun dissent urged that the contingency multiplier be based upon the fact of, rather than degree of, contingency in a particular case.¹⁶² The dissent reasoned that the purpose of contingency enhancement is "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 Con-

of her cases, some enhancement would be necessary. Moreover, the court failed to address the fact that the attorney would likely be denied compensation for many of her hours, a portion of her hourly rate, and compensation for delay in payment. *See id.* at 729 (citing *Cherry*, 601 F. Supp. at 80-81).

155. 483 U.S. at 730-34.

156. *See Islamic Center v. City of Starkville*, 876 F.2d 465, 471 & n.26 (5th Cir. 1989) (citing cases which have accepted Justice O'Connor's position "as the authoritative pronouncement of when a contingency enhancement is permissible under section 1988"); *McKenzie v. Kennickell*, 875 F.2d 330, 332 (D.C. Cir. 1989); *Lattimore v. Oman Constr.*, 868 F.2d 437, 439 & n.4 (11th Cir. 1989) (per curiam); *Fadhl v. City & County of San Francisco*, 859 F.2d 649, 650 n.1 (9th Cir. 1988) (per curiam); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 379-80 & n.11 (3d Cir. 1987) [hereinafter *Witco I*]; *Spell v. McDaniel*, 824 F.2d 1380, 1404 & n.23 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988).

157. 483 U.S. at 735 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.).

158. *Id.* at 735-51.

159. *Id.* at 735.

160. *Id.* (omissions in original) (citing S. REP. NO. 1011, *supra* note 154, at 5910).

161. *Id.* at 740.

162. *Id.* at 745-47 & n.11 (citing *Leubsdorf*, *supra* note 4, at 501).

gress.”¹⁶³ Thus, while it is appropriate for a court to consider the extent to which the agreement between the lawyer and the client is contingent, the court generally need not delve into the particular risks and circumstances of the case at hand. According to the dissent, when the contingency multiplier is determined in a uniform manner, rather than in consideration of the likelihood of success in a particular case, most of the majority’s objections to contingency multipliers become “irrelevant.”¹⁶⁴ Only “in a few, unusual cases [should] the likelihood of success . . . be taken into account” to provide an additional contingency enhancer, Justice Blackmun stated.¹⁶⁵

Several mandates can be derived from the three opinions in *Delaware Valley II*. First, all nine Justices agreed that “Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting [statutes].”¹⁶⁶ Second, five Justices agreed that, in the non-exceptional case, “compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the ‘riskiness’ of any particular case.”¹⁶⁷ Third, the same five Justices agreed that, in the non-exceptional case, “no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party ‘would have faced substantial difficulties in finding counsel in the local or other relevant market.’”¹⁶⁸ Finally, all but Justice O’Connor agreed that contingency multipliers are appropriate in exceptional cases based on the high degree of risk in those particular cases.¹⁶⁹

Struggling to apply the Supreme Court’s *Delaware Valley II* decision, the lower federal courts have essentially agreed on three points: (1) the opinion is

163. *Id.* at 745-46 (emphasis in original).

164. The dissent explained that where contingency multipliers are computed as a class and not individually, “there is no reason for a court to assess the success of a case retroactively, no cause for a conflict of interest to arise between attorney and client, and no possibility of a grant of huge multipliers simply because the odds against a case were significant.” An attorney’s use of profits from successful litigation to fund unsuccessful litigation, the dissent stated, is wholly consistent with Congress’ intent in enacting fee-shifting legislation. *Id.* at 752-53.

165. *Id.* at 751. The dissent urged that such special, additional enhancement might be appropriate where the legal risks were so apparent that they constituted an additional deterrent to representation, or where the result obtained was so significant and of such broad public interest as to warrant an additional incentive to representation.

166. *Id.* at 731 (O’Connor, J., concurring in part and concurring in the judgment); *see id.* at 735 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.); *see also id.* at 725 (White, J., plurality opinion, joined by Rehnquist, C.J., Powell & Scalia, JJ.).

167. *Id.* at 731 (O’Connor, J., concurring) (emphasis added); *see id.* at 726 (White, J., plurality opinion, joined by Rehnquist, C.J., Powell & Scalia, JJ.).

168. *Id.* at 733 (O’Connor, J., concurring) (quoting the plurality opinion, *id.* at 731).

169. The Blackmun dissent endorsed this concept explicitly. *Id.* at 751-52. The White plurality, although rejecting the proposition that contingency multipliers might be awarded in all risky cases, found that if contingency awards were to be made, they should be made only 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 725, 728. *See generally* H. NEWBERG, *supra* note 1; M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES (1986).

very confusing;¹⁷⁰ (2) lower courts are bound by Justice O'Connor's swing vote analysis;¹⁷¹ and (3) the Supreme Court failed to provide practical guidance as to how lower courts should determine the appropriateness of a contingency multiplier under the new scheme.¹⁷² Specifically, while advising courts that they should normally award contingency multipliers based only on the difference in market treatment of contingent fee cases as a class and only where such enhancement would be necessary in order for the prevailing party to obtain counsel, the Supreme Court did not explain how a court was to go about making these determinations.¹⁷³

Results are not yet in on how the lower courts will interpret the Supreme Court's decision on the contingency enhancer in *Delaware Valley II*. Some

170. In *Blum v. Witco Chemical Corp.*, 702 F. Supp. 493 (D.N.J. 1988), Judge Sarokin eloquently discussed the many problems he saw with the Supreme Court's analysis and the Third Circuit's interpretation of the Court in *Witco I*, 829 F.2d 367 (3d Cir. 1987). He summarized his frustration stating: "The Supreme Court has sent a Christmas gift to this court delivered via the Third Circuit Court of Appeals. It is called 'How to Make an Attorney Fee Multiplier.' However, the instructions are so confusing and inconsistent that this court has been unable to put the 'gift' together." 702 F. Supp. at 494.

Judge Sarokin made three specific criticisms. First, whereas the Supreme Court requires lower courts to examine contingency on a market-wide basis, in fact only the market for contingent fee representation in statutory fee cases is truly relevant, making for a circular analysis. *Id.* at 494-95. Second, whereas the Court prohibits lower courts from considering risks unique to a particular case, these risks are key factors in an attorney's willingness to handle such cases. *Id.* at 495. Third, whereas courts have consistently criticized the danger of lengthy and complex fee proceedings, the Third Circuit has nonetheless proposed a highly complex and expensive fee proceeding, even suggesting that econometric studies may be necessary to support a contingency award. Judge Sarokin explained:

Reading between the lines of both the Supreme Court and the Third Circuit's opinions in this matter, one may conclude that multipliers or other enhancers are so disfavored as to be virtually non-existent. One thing is certain, if multipliers are essential to the procurement of competent counsel to handle these matters, the proof required by virtue of these two decisions is so elusive, burdensome and expensive that the prospect of a hearing to obtain such relief is sufficient in and of itself to discourage counsel who otherwise would undertake such matters.

Id. at 496.

Unsurprisingly, the Third Circuit reversed Judge Sarokin's decision. *Blum v. Witco Chem. Corp.*, 888 F.2d 975 (3d Cir. 1989) [hereinafter *Witco II*]; see also *Witco I*, 829 F.2d at 367 (discussing circuit court's difficulty in understanding Supreme Court's holding in *Delaware Valley II* and in turning such holding into a blueprint for district court action).

See generally *Leading Cases*, *supra* note 1, at 292 (Court's decision in *Delaware Valley II* "fails to resolve the status of classwide risk enhancements and raises questions about the Court's ability to develop a coherent and consistent fee-award system without further guidance from Congress.").

171. *Delaware Valley II*, 483 U.S. at 733; see *supra* note 156.

172. See *supra* note 170.

173. See 702 F. Supp. at 493. When the Third Circuit, in *Witco II*, reversed Judge Sarokin's grant of a 50% contingency enhancement, the court reiterated the general instructions it had previously provided in *Witco I*. It explained that (1) a lower court must look to how contingency is compensated in *all* contingency fee cases; (2) a court must calculate risks present generally, rather than in a specific case; (3) courts should calculate one contingency enhancement and then apply it in all future cases; and (4) plaintiffs' counsel need not necessarily present an econometric study to justify the requested fee. However, the Third Circuit offered no practical advice on how to compile such evidentiary showings. See *Witco II*, 888 F.2d at 982.

appellate courts have proved more willing to deny contingency awards on the ground that the plaintiff's showing was inadequate, than to state clearly what type of showing would be necessary to obtain the award. For example, both the District of Columbia Circuit and the Fourth Circuit reversed district court contingency multiplier awards on the ground that plaintiffs had failed to demonstrate either that the award was consistent with how the local market treated contingency cases as a class or that the award was necessary to attract competent counsel.¹⁷⁴ Neither court advised plaintiffs on how they could have bolstered their showing on these points.

The Third Circuit, while purporting to provide some guidance, has repeatedly thrown the ball back into the district courts' laps, inviting them to come up with a reasonable evidentiary procedure for computing the contingency multipliers. In *Witco I*, the Third Circuit reversed the pre-*Delaware Valley II* opinion of the district court that had granted the plaintiffs a 20% contingency multiplier, requiring the district court to reconsider the multiplier in light of *Delaware Valley II*.¹⁷⁵ The Third Circuit speculated that an econometric study might be necessary to support a contingency award,¹⁷⁶ but recognized that it might not be fair or feasible to expect an individual plaintiff or even a class of plaintiffs to conduct an econometric analysis of an entire market. The court ultimately invited the district court to come up with its own methodology.¹⁷⁷

On remand, the plaintiffs chose not to present an econometric study due to the cost involved,¹⁷⁸ and instead presented affidavits of nine lawyers. The district court ruled that the affidavits, though lacking in various respects, were sufficient to support a 50% contingency enhancement, based on the plaintiffs' showing regarding the low availability of counsel in employment discrimination litigation.¹⁷⁹ In *Witco II*, the Third Circuit reversed, finding the affidavits insufficient to support any contingency enhancement.¹⁸⁰ Subsequently, in

174. See *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 (D.C. Cir. 1987), *vacated*, 857 F.2d 1516, 1521-24 (D.C. Cir. 1988) (en banc); *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). But see *infra* text accompanying notes 186-91 (District of Columbia Circuit subsequently spelled out appropriate standard in *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990)).

175. 829 F.2d 367, 380-82 (3d Cir. 1987).

176. *Id.* at 380.

177. *Id.* at 381-82.

178. Plaintiffs submitted an expert's affidavit stating that the cost of developing a mathematical model to study the relationship between the hourly rate and contingency compensation would be \$17,600. *Blum v. Witco Chem. Corp.*, 702 F. Supp. 493, 498 (D.N.J. 1988).

179. *Id.* at 500. The district court found the affidavits deficient in that only one affiant, other than plaintiffs' attorney, attempted to quantify the enhancement necessary to attract attorneys to contingent fee litigation. The court contrasted the affidavits presented in *Witco* with those presented by plaintiffs in *Black Grievance Committee v. Philadelphia Electric Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988), a case in which the district court awarded a contingency enhancement of 200% based on plaintiffs' witnesses' uncontested affidavits showing the necessity of such enhancements.

180. 888 F.2d 975 (3d Cir. 1989).

Rode v. Dellarciprete,¹⁸¹ the Third Circuit upheld a district court's refusal to award a contingency multiplier based on affidavits from three attorneys. The circuit court, asserting that such multipliers should rarely be awarded, found that the affidavits failed to establish with sufficient specificity the requirements of *Delaware Valley II*.¹⁸² Most recently, in *Kelly v. Matlack, Inc.*,¹⁸³ the Third Circuit upheld a district court's refusal to grant plaintiff's petition for an enhancement of 100% based on eight affidavits of local attorneys. The circuit court did not identify the flaws in the affidavits but simply stated that the district court had not abused its discretion in denying the multiplier.¹⁸⁴ Consequently, the showing necessary to warrant a contingency enhancement remains unclear in that circuit.

Four appellate courts have approved significant contingency multipliers in statutory fee cases,¹⁸⁵ ranging from 1.75 to 2.0, but even these courts have generally failed to spell out what kind of evidentiary showing a plaintiff must make in order to obtain a contingency enhancer.

The best appellate decision on the contingency issue, from the perspective of plaintiffs' counsel, is *King v. Palmer*.¹⁸⁶ In *King*, the District of Columbia Circuit reversed the district court's award of a mere 50% contingency enhancer¹⁸⁷ and ruled that an enhancer of 100% was required by the evidence. Plaintiff presented affidavits from over seventy practitioners. The appellate court ruled that while many of the affidavits referred only to a "reasonable" enhancement, the "bulk of the evidence" supported a 100% enhancement.¹⁸⁸ The court also cited a number of district court decisions within the circuit as supporting a 100% enhancement.¹⁸⁹ While recognizing that the 100% enhancement exceeded the one-third enhancement urged by Justice White in the plurality opinion of *Delaware Valley II*, the court nevertheless found the higher enhancement appropriate on the ground that White's lower enhancement would not provide attorneys with the incentive to accept cases in which they believe they have less than a 50% likelihood of success.¹⁹⁰

181. 892 F.2d 1177 (3d Cir. 1990).

182. *Id.* at 1184-85.

183. 903 F.2d 978 (3d Cir. 1990).

184. *Id.* at 987.

185. *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990); *Fadhil v. City & County of San Francisco*, 859 F.2d 649 (9th Cir. 1988); *Lattimore v. Oman Constr.*, 868 F.2d 437 (11th Cir. 1989); *Fite v. First Tenn. Prod. Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988).

Interestingly, at least one court has applied the holding of the Supreme Court in *Delaware Valley II*, a statutory fee case, to common fund attorney's fee litigation. *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989).

186. 906 F.2d 762 (D.C. Cir. 1990).

187. *King v. Palmer*, No. CIV. A. 83-1980-LFO (D.D.C. Sept. 20, 1988) (1988 WL 104970).

188. 906 F.2d at 766-67.

189. *Id.* at 767.

190. *Id.* Justice Williams, concurring, found that the 100% enhancement was appropriate not because of the affidavits submitted but rather as a matter of policy, to encourage attorneys to handle those cases where plaintiff's prospects for success are 50% or better. *Id.* at 769.

The *King* decision benefits plaintiffs not only because it adopts a 100% enhancement, but also because it states that such an enhancement *must* be applied in all future contingency enhancement awards within the circuit, absent new evidence or legislation.¹⁹¹ In light of this decision, it is likely that far more attorneys will be willing to accept plaintiffs'-side civil rights cases within the District of Columbia Circuit.

The three other circuit courts which have ruled favorably on the contingency issue handed down much more perfunctory opinions. In *Fadhl v. City & County of San Francisco*,¹⁹² the Ninth Circuit affirmed a contingency multiplier of 2.0 based on the district court's finding that "contingent fees that yield approximately two times the ordinary hourly rate . . . is the return expected by lawyers in the relevant market."¹⁹³ In *Lattimore v. Oman Construction*,¹⁹⁴ the Eleventh Circuit affirmed an award of a 100% contingency enhancement based on the established dearth of attorneys willing to accept employment cases on a contingency fee basis. In *Fite v. First Tennessee Production Credit Association*,¹⁹⁵ the Sixth Circuit affirmed a 1.75 contingency multiplier given the contingent nature of the fee agreement and the fact that plaintiff's counsel worked in a two-person firm and therefore had to forego a substantial amount of other work in order to handle the employment discrimination matter.¹⁹⁶ In none of these cases, however, did the appellate courts elaborate on plaintiffs' evidentiary showings or offer a guide to lower courts for determining what kind of showing would be sufficient to establish an entitlement to a contingency multiplier.

By contrast, several district courts have supported their awards of contingency enhancers with more detailed discussions of the evidentiary showing needed to obtain such an award. In each of these cases, the courts based their awards upon affidavits presented by plaintiffs to establish that contingency enhancements are necessary to attract attorneys to contingency fee litigation generally and to employment litigation in particular. For example, in *Black Grievance Committee v. Philadelphia Electric Co.*,¹⁹⁷ the district court awarded a contingency enhancement of 200% based on plaintiffs' affidavits showing that attorneys in the Philadelphia area would accept such cases "only if their recovery would be at least double their normal hourly billing rate."¹⁹⁸ The

191. *Id.* at 767. Despite the favorable holding of the *King* decision, it does not permit plaintiffs to recover a contingency multiplier for hours expended in fee litigation itself. *Id.* at 769.

192. 859 F.2d 649 (9th Cir. 1988) (per curiam), *aff'g* *Fadhl v. Police Dep't of City & County of San Francisco*, 47 Fair Empl. Prac. Cas. (BNA) 289 (N.D. Ca. 1985).

193. *Id.* at 650 (referring to the market of Title VII cases in San Francisco). In reaching its decision, the circuit court noted that plaintiff had approached thirty-five lawyers before finding one willing to take her case. *Id.* at 651.

194. 868 F.2d 437 (11th Cir. 1989) (per curiam), *aff'g* 714 F. Supp. 1178 (N.D. Ala. 1988).

195. 861 F.2d 884 (6th Cir. 1988).

196. *Id.* at 895.

197. 690 F. Supp. 1393 (E.D. Pa. 1988).

198. *Id.* at 1400. The affidavits presented by plaintiffs in *Black Grievance Committee v.*

court noted that defendant made no attempt to contradict plaintiffs' affidavits.¹⁹⁹

Numerous other district courts have relied upon the affidavits of local attorneys to support contingency enhancements of up to 100%.²⁰⁰ These affidavits typically state that the affiant, an attorney familiar with the local market, believes that a contingency enhancement of 100% or more is necessary to attract competent counsel to civil rights litigation.²⁰¹ Often the affiants explain that they themselves ceased taking civil rights cases on a contingent fee basis because they found the practice economically unrewarding.²⁰² Many affiants also state that they have perceived a steady decline in the number and quality of attorneys willing to handle civil rights cases on a contingent fee basis.²⁰³ Others state that they would no longer continue to take such cases if they knew they could not obtain a contingency enhancement.²⁰⁴ Plaintiffs

Philadelphia Electric Co., No. CIV. A. 75-3156 (E.D. Pa. filed Nov. 4, 1975), are on file with the Author [hereinafter *Black Grievance Committee Affidavits*]. Some of these affidavits, together with sample affidavits from other cases, are reprinted in H. NEWBERG, *supra* note 1, app.

199. 690 F. Supp. at 1400-01. While a defendant might argue that the affidavits submitted by plaintiffs regarding the contingency multiplier are inadmissible hearsay, it is unlikely that a court would accept this argument. *See Witco I*, 829 F.2d 367, 377 (3d Cir. 1987) (many fee disputes are decided based on affidavits to prevent fee disputes from assuming massive proportions); *see also* Blum v. Stenson, 465 U.S. 886, 892 n.5 (1984) (no evidentiary hearing is necessary where defendant fails to make any factual challenge to information contained in plaintiffs' affidavits).

200. *See, e.g.*, *Norwood v. Charlotte Memorial Hosp. and Medical Center*, 720 F. Supp. 543 (W.D.N.C. 1989) (affidavits presented by plaintiffs supported contingency enhancement of 100%); *Thompson v. Kennickell*, 710 F. Supp. 1 (D.D.C. 1989) (plaintiffs awarded 100% contingency enhancement based on affidavits from District of Columbia practitioners establishing that the local market requires fee enhancement for contingency of at least 100% and probably 200%, and that given the recognized difficulty of handling Title VII cases against the government, plaintiff would have faced great difficulty obtaining counsel absent an enhancement); *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988) (plaintiffs awarded 50% contingency enhancement, full sum they had requested, based on twenty-one affidavits from local attorneys practicing in a variety of large, small, private, and public interest firms), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989); *Hidle v. Geneva County Bd. of Educ.*, 681 F. Supp. 752 (M.D. Ala. 1988) (100% enhancement awarded based on affidavits showing Alabama attorneys receive multipliers ranging from 1.5 to 8.0 for contingent fee work); *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988) (plaintiffs awarded 50% enhancer in partially contingent case). *See generally* Amicus Brief, *supra* note 5.

201. *See, e.g.*, Affidavits of William H. Ewing, Esq., Richard Z. Freemann, Jr., Esq., Richard D. Greenfield, Esq., Mitchell A. Kramer, Esq., Michael P. Malakoff, Esq. and Henry T. Reath, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198; *see also* affidavits cited in *McKenzie*, 684 F. Supp. at 1101 and in *Palmer*, 679 F. Supp. at 74-75.

202. *See, e.g.*, Affidavits of Michael Churchill, Esq. and Michael P. Malakoff, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198; affidavits cited in *Hidle*, 681 F. Supp. at 754.

203. *See, e.g.*, Affidavits of Michael Churchill, Esq. and Michael P. Malakoff, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198; affidavits cited in *Palmer*, 679 F. Supp. at 74-75.

204. *See, e.g.*, Affidavits of Richard Z. Freemann, Jr., Esq., Richard D. Greenfield, Esq., Mitchell A. Kramer, Esq., Alan M. Lerner, Esq., Michael P. Malakoff, Esq. and Henry T. Reath, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198; affidavits cited in *Palmer*, 679 F. Supp. at 74-75.

have also submitted affidavits or testimony from prospective litigants and community leaders who have assisted them, detailing the great difficulty they have encountered in locating and obtaining plaintiffs'-side counsel.²⁰⁵

No plaintiffs have yet chosen to support their request for a contingency multiplier with an econometric study such as that conceptualized by Judge Becker of the Third Circuit in *Witco I*.²⁰⁶ This should come as no surprise, given the inherent difficulty and expense of performing such a study.²⁰⁷ An econometric study would seek to compare the hourly earnings in contingent and non-contingent fee cases, but the Supreme Court did not make clear what kinds of contingent fee cases might be relevant for comparative purposes.²⁰⁸ Cases cannot simply be categorized as contingent or non-contingent, because many attorneys handle cases on complicated partially contingent bases. For example, some attorneys require the client to pay a minimum hourly rate or

205. See, e.g., affidavits cited in *McKenzie*, 684 F. Supp. at 1103 (affidavits submitted by nine persons who, having failed to secure counsel, were forced to proceed pro se); Affidavit of Harold Glass, in *Black Grievance Committee Affidavits*, supra note 198 (difficulty encountered by named plaintiff in obtaining and retaining counsel); see also Affidavit of Michael Churchill, Esq., Chief Counsel of the Public Interest Law Center of Philadelphia, in *Black Grievance Committee Affidavits*, supra note 198; *Lattimore v. Oman Constr.*, 868 F.2d 437, 439 (11th Cir. 1989) (plaintiff presented uncontroverted testimony of numerous experienced practitioners leading district court to find a "dearth" of attorneys willing to accept cases on contingency basis); *Fadhil v. City & County of San Francisco*, 859 F.2d 649, 651 (9th Cir. 1988) (testimony from the Executive Director of the San Francisco Lawyers' Committee for Urban Affairs). Several courts have noted that the issue is not whether the plaintiff actually had difficulty locating counsel in the case at bar, but rather whether plaintiffs are in a class which would have substantial difficulty absent a contingency enhancement. See, e.g., *King v. Palmer*, 906 F.2d 762, 768 (D.C. Cir. 1990); *Bucci v. Chromalloy Am. Corp.*, 53 Empl. Prac. Dec. (CCH) ¶ 39,882 (N.D. Cal. 1989).

206. 829 F.2d 367 (3d Cir. 1987).

207. See supra note 178 and accompanying text.

208. Should plaintiffs present a study of *all* contingent fee cases, including personal injury, securities fraud, real estate, and all sorts of other matters, or should they instead limit themselves to certain subcategories of contingent litigation? The jumble of opinions in *Delaware Valley II* has not adequately answered this question. See, e.g., 483 U.S. 711, 713 (1987) (White, J., plurality opinion); *id.* at 731 (O'Connor, J., concurring); *id.* at 735 (Blackmun, J., dissenting). This lack of cohesion is reflected in the decisions of lower courts. Compare *Witco I*, 829 F.2d 367, 381 (3d Cir. 1987) (relevant market includes all contingency cases, including personal injury cases); *McKenzie v. Kennickell*, 875 F.2d 330, 334 (D.C. Cir. 1989) (relevant class includes all contingency matters in metropolitan area, particularly complex federal litigation, and not just statutory fee cases) and *Hidle v. Geneva County Bd. of Educ.*, 681 F. Supp. 752, 757 (M.D. Ala. 1988) (considering compensation paid to Alabama lawyers in personal injury and debt collection matters) with *Fadhil*, 859 F.2d at 650 (relevant market is Title VII cases in San Francisco) and *Blum v. Witco Chem. Corp.*, 702 F. Supp. at 494-95 (only statutory fee cases are relevant to determine compensation necessary to attract attorneys to such cases).

The lower courts have also disagreed about whether the fact that the plaintiff's attorney works for a "public interest" or non-profit firm is relevant to the calculation of a contingency multiplier. Compare *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) (high rates may not be necessary to attract attorneys to plaintiffs'-side civil rights litigation since such attorneys may often derive a psychological benefit from working for public interest firms) with *McKenzie*, 875 F.2d at 333 (non-profit firms are entitled to same contingency enhancement as are private firms) and *Thompson v. Kennickell*, 710 F. Supp. 1 (D.D.C. 1989) (private attorney who charges below market hourly rates entitled to fee award based upon higher, prevailing market rates).

retainer, while others may earn success premiums. Comparisons are all the more difficult because personal injury attorneys conducting a high percentage of contingent fee litigation often do not keep track of the hours they spend on their cases.²⁰⁹ Given these and other possibly unanswerable questions, an econometric study would need to be extremely complex in order to account for all imaginable variables. Consequently, it is not surprising that plaintiffs have relied on the familiar affidavit methodology rather than seeking to prepare an econometric study. Several courts have explicitly held that plaintiffs need not present such a study in order to qualify for a contingency enhancement.²¹⁰

Other courts have not been as generous. For example, a District Court for the Eastern District of Texas limited the contingency enhancement to just 33% based on dictum in the plurality opinion in *Delaware Valley II* that the fee enhancement for contingency should not exceed one-third of the court-awarded lodestar.²¹¹ Another district court denied plaintiff's counsel any contingency multiplier on the ground that counsel had already received \$20,000 in fees from his client, even though the lodestar totaled \$919,067.25.²¹² Other courts have flatly refused to award a contingency multiplier, stating that plaintiff's evidentiary showing of need for enhancement was insufficient in view of *Delaware Valley II*.²¹³

In sum, it is still too early to tell precisely how the lower courts will apply the Supreme Court's split decision in *Delaware Valley II*. While several district courts have proved willing to award plaintiffs enhancements of 100% or more based on affidavit evidence, it is not yet clear that most appellate courts will affirm these awards. It does, however, seem fairly certain that courts will not award enhancements exceeding 100% for contingency in any but the rarest of cases.²¹⁴

209. Blum, *Big Bucks, but . . .*, Nat'l L.J., Apr. 3, 1989, at 1.

210. See, e.g., *McKenzie*, 875 F.2d at 336; *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988); *Blum v. Witco Chem. Corp.*, 702 F. Supp. at 493; *Thompson*, 710 F. Supp. at 6 ("While the plaintiffs' proof may lack statistical validity, it is also true that a federal court is not a seminar in advanced mathematics."); see also *Witco II*, 888 F.2d 975, 983 (3d Cir. 1989) (stating econometric study not necessarily required, but failing to state what alternative would suffice, and urging local attorneys to undertake such study).

211. *Shipes v. Trinity Indus., Inc.*, 685 F. Supp. 607 (E.D. Tex. 1987), *appeal dismissed*, 883 F.2d 339 (5th Cir. 1989); see also *Garmong v. Montgomery County*, 668 F. Supp. 1000 (S.D. Tex. 1987) (lodestar enhanced by only 10% contingency award).

212. *Springs v. Thomas*, 709 F. Supp. 253, 257 (D.D.C. 1989).

213. See *supra* note 174.

214. One court did award plaintiffs a contingency enhancement of 200% (equivalent to a multiplier of 3.0). However, the court also used the *Hensley* reducer to cut plaintiffs' counsel's award dramatically. In the end, after all the enhancements and reductions, plaintiffs were awarded a sum which was lower than even the lodestar sum for which they had initially applied. See *Black Grievance Comm. v. Philadelphia Elec. Co.*, 615 F. Supp. 1069 (E.D. Pa. 1985), *vacated*, 802 F.2d 648 (3d Cir. 1986), *vacated*, 483 U.S. 1015, *remanded to* 825 F.2d 768 (3d Cir. 1987), *remanded to* 690 F. Supp. 1393 (E.D. Pa. 1988).

D. Related Decisions

In addition to restricting the manner in which attorney's fees shall be calculated, the Supreme Court has, in a series of related decisions, created additional obstacles for attorneys trying to earn a living practicing plaintiffs'-side civil rights law. These decisions are discussed below.

1. Offers of Judgment

In *Marek v. Chesny*,²¹⁵ the Court applied Rule 68 of the Federal Rules of Civil Procedure²¹⁶ to hold that where a civil rights plaintiff rejects an "offer of judgment" exceeding the relief plaintiff actually obtains at trial, plaintiff is not entitled to reimbursement for attorney's fees accrued after the date on which the offer of judgment was rejected.²¹⁷ *Marek* focused on whether attorney's fees, which might otherwise be awarded pursuant to Section 1988, were properly considered "costs" under Rule 68, such that a prevailing plaintiff who failed to obtain a judgment exceeding the offer should be required to pay her own attorney's fees.²¹⁸

The plaintiff in *Marek* brought suit against three police officers who shot his son when responding to a call regarding domestic violence.²¹⁹ Defendants, prior to trial, made an offer of settlement, including all accrued costs and attorney's fees, of \$100,000. Both parties agreed that plaintiff had accrued \$32,000 in allowable costs and attorney's fees at the time of the offer. Chesny rejected the offer, went to trial, and was awarded a total of \$60,000 on the merits of his claim.²²⁰ Plaintiff then filed a request for \$171,692.47 in costs

215. 473 U.S. 1 (1985).

216. Rule 68 provides in relevant part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

FED. R. CIV. P. 68 [hereinafter Rule 68].

217. The *Marek* decision has been analyzed by a number of commentators. See, e.g., Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes that Do and Do Not Classify Attorneys' Fees as "Costs"*, 73 IOWA L. REV. 413 (1988) (advocating that plaintiff receive a percentage of costs accrued after offer rejected, based upon comparison of amount of offer with judgment actually received); Simon, *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475 (1986) (analyzing *Marek* and providing practical advice to plaintiffs and defendants on how to operate in light of the decision); Note, *Anatomy of a Double Whammy: The Application of Rule 68 Offers and Fee Waivers of Civil Rights Attorneys' Fees Under Section 1988*, 37 DRAKE L. REV. 103 (1987) (urging statutory reform to overrule *Marek*).

218. 473 U.S. at 1.

219. See *id.* at 3.

220. See *id.* at 3-4.

and attorney's fees which was opposed by defendants who relied on Rule 68.²²¹ Defendants contended that because the sum of the relief obtained by Chesny, \$60,000, and the fees and costs accrued by the time of the settlement offer, \$32,000, were less than the offer, \$100,000, Rule 68 required Chesny to pay his own post-offer costs, and that under the definition in Section 1988 these costs included attorney's fees.²²² Therefore, argued defendants, although Chesny had prevailed at trial he was entitled only to his pre-offer of judgment attorney's fees.

The Supreme Court accepted defendants' argument in a 6-3 opinion.²²³ The Court ruled that where the underlying statute, in this case Section 1988, defines the term "costs" to include attorney's fees, such fees are governed by the provisions of Rule 68.²²⁴ The majority rejected plaintiff's argument that this result was inimical to the terms and policy of the fee-shifting civil rights legislation. Instead the Court concluded that "Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. . . . [M]any civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68."²²⁵

Justice Brennan, writing for the dissent, took a different view of the matter, stating:

The Court's decision inevitably will encourage defendants who know they have violated the law to make "low-ball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.²²⁶

Justice Brennan found this scenario to be "fundamentally incompatible" with what Congress intended to accomplish by enacting the fee-shifting legislation.²²⁷ Brennan also argued that the majority's decision was absurd in that it required Rule 68 to be interpreted differently depending upon the definition of

221. *See id.* at 4.

222. *See id.*

223. *Id.* at 12. *Contra id.* at 13 (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.).

224. *Id.* at 7-12.

225. *Id.* at 10.

226. *Id.* at 31 (Brennan, J., dissenting).

227. *Id.* at 31-32.

"costs" in each of the over one hundred federal statutes which permit an award of attorney's fees to prevailing plaintiffs.²²⁸ Thus, suggested the dissent, a successful plaintiff might "be barred from recovering otherwise reasonable attorney's fees for a defective toaster (under the Consumer Product Safety Act) but not for a defective bumper (under the Motor Vehicle Act)."²²⁹

Although low-ball offers of judgment have not yet reached the epidemic proportions feared by Justice Brennan, the decision is nonetheless troubling in that it requires the plaintiff to bear the full risk of the inherent uncertainties of litigation. Whereas *Marek* sharply penalizes a plaintiff for overestimating the value of the case, no parallel penalty is ever assessed on a defendant. A plaintiff's attorney in a civil rights case may well have to choose between accepting a meager settlement in order to cut off the risk of virtually no future compensation, and proceeding to trial, knowing that even if she wins the case and the relief obtained is too low, she may receive no payment at all for her post-offer hours. Given the uncertainties of litigation, plaintiff's counsel generally will feel forced to take the former route.²³⁰

2. Waiver of Attorney's Fees

In *Evans v. Jeff D.*,²³¹ the Supreme Court addressed the question of

228. *Id.* at 21-27.

229. *Id.* at 24.

230. *Marek* is particularly harsh in civil rights cases where the plaintiff seeks primarily injunctive relief. For example, in *Spencer v. General Electric Co.*, 706 F. Supp. 1234 (E.D. Va. 1989), *aff'd*, 894 F.2d 651 (4th Cir. 1990), the plaintiff won a hostile environment sex discrimination suit against her employer. She sought \$381,580.64 in attorney's fees and the court reduced the award to just \$56,709.40, the amount of fees that counsel had charged prior to the plaintiff's rejection of an offer of judgment. *See* 706 F. Supp. at 1236. The court found that although the primary relief obtained by the plaintiff through litigation was the defendant's adoption of a detailed sexual harassment policy, the offer of judgment, which did not outline such a proposed policy, was nonetheless more generous than the relief ultimately obtained. The court explained that the offer contained monetary relief not awarded by the court and that, if the plaintiff had pursued the offer of judgment, she could have successfully negotiated a more detailed sexual harassment policy. *Id.* at 1241-42.

The plaintiffs fared somewhat better in *Real v. Continental Group, Inc.*, 653 F. Supp. 736 (N.D. Cal. 1987). In that case defendants made plaintiffs an offer of judgment consisting of \$35,000 in back pay, \$7,000 in attorney's fees then accrued, and reinstatement of plaintiffs to their prior positions. *See id.* at 738. Plaintiffs rejected the offer, went to trial, and obtained a jury verdict of \$265,820 which was reduced by the court to \$50,000. *See id.* at 737. When plaintiffs' counsel later sought approximately \$600,000 in fees and costs, defense counsel argued that plaintiffs had secured less relief than was provided in the offer and that they were therefore limited to \$7,000 in fees. *See id.* at 738. The court rejected defendant's argument. Citing Justice Brennan's dissent in *Marek*, the court ruled that since it would be too difficult to assess the monetary value of the offer of reinstatement, it would not be proper to include such an assessment in the equation comparing the value of the offer of judgment to the relief obtained by plaintiff. Instead, the court found, "the better course is to compare monetary awards only." *Id.* at 739. Comparing the \$50,000 judgment obtained by plaintiffs to the \$42,000 in monetary relief previously offered by defendant, the court found that *Marek* did not preclude an award of reasonable attorney's fees incurred by plaintiffs subsequent to their rejection of the offer of judgment. *Id.*

231. 475 U.S. 717 (1986).

whether a defendant could avoid payment of attorney's fees and costs to prevailing plaintiffs by obtaining a waiver of such fees and costs as part of a settlement. Resolving a split among the circuits,²³² a 6-3 majority of the Court concluded that a district court may, in its discretion, determine that such a waiver is valid.²³³

Evans was a class action brought against the Governor and other public officials of Idaho on behalf of a class of children who suffer from emotional and mental handicaps. The suit sought several forms of injunctive relief, as well as reasonable costs and attorney's fees, but no damages.²³⁴ Plaintiffs were represented by the Idaho Legal Aid Society which was prohibited from representing persons who could afford to pay their own fees. As a result, the Legal Aid Society entered into no fee agreement with the plaintiff class, with the understanding that it would be compensated through the fee-shifting legislation if plaintiffs prevailed in their suit.²³⁵

Shortly before trial, defendants offered plaintiffs a settlement which included virtually all the injunctive relief plaintiffs had requested. However, defendants conditioned the offer on a total waiver of fees by plaintiffs' counsel.²³⁶ Feeling an ethical obligation to his client to accept the settlement, plaintiffs' counsel conditioned acceptance of the settlement upon approval of the fee waiver by the district court.²³⁷

The district court approved the settlement and the fee waiver,²³⁸ rejecting the argument by plaintiffs' counsel that the fee waiver was coercive in that it exploited the counsel's ethical duties to his clients. The court found the waiver acceptable in that "it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain

232. Prior to *Evans*, the Third Circuit prohibited the simultaneous negotiation of attorney's fees and relief on the merits, *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), while the Ninth Circuit only "strongly discouraged" such a practice in the absence of mitigating factors, *Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

233. It would seem that the waiver must be explicit. In *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695 (9th Cir. 1989), the Ninth Circuit held that a civil rights consent decree's silence with respect to the fee issue was not sufficient to indicate that plaintiffs had waived their right to fees. The *Evans* decision has been analyzed by numerous commentators. See, e.g., Goldstein, *Preserving Fee-Shifting After Evans v. Jeff D.: Joint Attorney/Client Control of Settlements*, 11 INDUS. REL. L.J. 267 (1989); Note, *Fees as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since Evans v. Jeff D.*, 102 HARV. L. REV. 1278 (1989); Note, *Evans v. Jeff D.: Putting Private Attorneys General on Waiver*, 41 VAND. L. REV. 1273 (1988); Note, *Attorneys — The Elimination of Statutory Attorneys' Fees Through Simultaneous Negotiations*, 35 U. KAN. L. REV. 625 (1987); Comment, *Giving Substance to the Bad Faith Exception of Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Awards Act of 1976*, 136 U. PA. L. REV. 553 (1987).

234. See 475 U.S. at 720-21.

235. See *id.* at 721.

236. See *id.* at 722.

237. See *id.*

238. See *id.* at 723-24.

for his client[s].’ ”²³⁹ The Ninth Circuit reversed, reasoning that because the federal policy embodied in the fee-shifting legislation normally requires an award of fees to prevailing plaintiffs, simultaneous negotiation of the merits and attorney’s fees should not generally be permitted.²⁴⁰

The Supreme Court reversed the court of appeals, deeming the fee waiver acceptable. The Court concluded that “[t]he text of the Fees Act provides no support for the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits.”²⁴¹ Rather, the Court suggested that a prohibition on fee waivers might impede the vindication of civil rights by discouraging settlement by those defendants whose offers would otherwise be contingent on such waivers.²⁴² The Court downplayed the concern that clients’ decisions to bargain away their attorney’s fees might, in the long run, make lawyers less willing to take on civil rights cases.²⁴³ A fee waiver is permissible, the Court concluded, so long as the district court, reviewing a class action settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure, concludes that the waiver is reasonable in light of all the circumstances of the case.²⁴⁴

Phillips v. Allegheny County,²⁴⁵ illustrates the kind of problem *Evans* can create for plaintiffs’ civil rights attorneys. Stanley Phillips, a paraplegic, brought suit against Allegheny County claiming unfair admission and discharge policies of a county-operated nursing facility.²⁴⁶ Phillips, a resident of the facility, allegedly violated one of its regulations and was discharged on a Friday afternoon. The facility refused to return his wallet, identification papers, money and medical assistance card on the ground that these items were locked in an office and could not be provided to him until the following Monday. Although a maintenance worker allowed Phillips to remain in the hospital lobby over the weekend, he lacked food, necessary medical treatment, and bathroom facilities. On Monday, Phillips, acting through his attorney, sought readmission by amending an already pending complaint regarding the facility’s admissions policies.²⁴⁷ After negotiations, the parties reached a settlement which awarded Phillips \$3,000 and promised changes in the facility’s admission and discharge policies. The settlement also required Phillips’ attorney to waive any claim to attorney’s fees.²⁴⁸

Ten days later Phillips and his attorney filed for fees, notwithstanding the waiver. Phillips claimed he desperately needed the money and thought he

239. See *id.* at 723 (quoting Chief Judge Callister of the District Court for the District of Idaho).

240. *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984).

241. 475 U.S. at 730 (interpreting Section 1988).

242. *Id.* at 732.

243. *Id.* at 741-42 & n.34.

244. *Id.* at 729-43.

245. 869 F.2d 234 (3d Cir. 1989).

246. See *id.* at 235-36.

247. See *id.* at 236.

248. See *id.*

could get it only by signing the waiver.²⁴⁹ The district court threw out the waiver, calling the county's behavior "repugnant and shocking to the conscience."²⁵⁰ On appeal, the Third Circuit reversed the district court's award of fees, explaining that the mere negotiation of a fee waiver, even with a client who urgently needs to settle, does not in itself amount to overreaching or fraud.²⁵¹ The court held that a party or an attorney may challenge an unfairly obtained waiver only by registering a complaint with the district court *before* the settlement has been signed.²⁵² In short, it is now clear, at least in the Third Circuit, that an attorney who represents an indigent client may very well not be compensated for legal work performed.

Attorneys who take civil rights cases seeking primarily monetary relief are less vulnerable to such an outcome. As long as the attorney has her client sign an appropriate retainer agreement,²⁵³ she can collect her fee out of the settlement agreement. However, even in these cases the attorney faces serious obstacles in protecting her fee. For example, in a class action context it is often virtually impossible for the attorney to obtain an adequate fee agreement. She may not even know who all of the class members are, much less be able to meet with them or obtain their signatures on a fee agreement. Given that contingency fee agreements are not binding on unnamed class members,²⁵⁴ class counsel may find herself foregoing her fee simply because of the unwieldy size of the class.

3. *Expert Witness Fees*

Civil rights plaintiffs often must retain statistical, economic, and other experts to assist with the preparation of the litigation and to testify at trial.²⁵⁵ These experts can be quite costly, frequently charging hundreds of dollars per hour for their time, plus travel and accommodation expenses.²⁵⁶ Because

249. *See id.* at 236-37.

250. *See id.* at 237 (quoting Judge Simmons of the District Court for the Western District of Pennsylvania).

251. *Id.* at 239.

252. *Id.* at 240.

253. *See infra* text accompanying notes 418-26.

254. *See* Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. Section 1988*, 55 U. COLO. L. REV. 341, 356 (1984) (noting that contingency fee agreements do not bind unnamed class members nor are they useful where the relief sought is primarily equitable).

255. *See* Denny v. Westfield State College, 880 F.2d 1465, 1471 (1st Cir. 1989) ("[i]t is widely recognized that statistical evidence can be a valuable tool for proving or disproving employment discrimination" (citing Chang v. University of Rhode Island, 606 F. Supp. 1161, 1188 (D.R.I. 1985))); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 & n.20 (1977); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331-78 (2d ed. 1983); *see also* International Woodworkers Local 5-376 v. Champion Int'l Corp., 790 F.2d 1174, 1192-93 (5th Cir. 1986) (en banc) (Judge Rubin concurring in result in part and dissenting in part) (stating expert witness fees are unavoidable and noting that one study found expert testimony controls the outcome in two-thirds of all cases), *aff'd*, 482 U.S. 437 (1987).

256. *See, e.g.,* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) (prevailing defendant was awarded \$86,480 in compensation for witness fees by the district court).

plaintiffs themselves often cannot afford to pay these costs, plaintiffs' counsel must advance thousands of dollars with the hope that they will recoup the payments at the successful conclusion of the litigation.²⁵⁷

Two recent Supreme Court decisions, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, and its companion case, *Champion International Corp. v. International Woodworkers*,²⁵⁸ bear on the issue of limitations on compensation to prevailing parties for expert witness fees. *Crawford* addressed the question of whether a prevailing antitrust defendant's award of costs, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, may exceed the limitation of \$30 per day of expert testimony set in 28 U.S.C. Sections 1821 and 1920.²⁵⁹ In *Woodworkers*, the Court considered whether the \$30 per day limit applied to a defendant who prevailed in a civil rights case.²⁶⁰ Ruling that the limitation did apply in both cases, the Court stated that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920."²⁶¹

As Justice Blackmun makes clear in his concurring opinion, the *Crawford* majority did not deal with the issue of whether Section 1988 or the attorney's fees provision of Title VII is "explicit statutory authority" countervailing the normal \$30 per hour limitation of 28 U.S.C. Sections 1821 and 1920.²⁶² However, many lower courts have proved reluctant to award expert witness fees in excess of the \$30 per day limit to prevailing civil rights plaintiffs in view of the ambiguity of the *Crawford* decision. While some courts have awarded expert witness fees under Section 1988,²⁶³ at least as many post-*Crawford* courts have

257. See, e.g., Amicus Brief, *supra* note 5, at 8-10 (discussing case in which a single firm spent more than \$160,000 in expenses on expert witnesses).

258. 482 U.S. 437 (1987). *Crawford* was consolidated with *Woodworkers*.

259. *Id.* at 438-39. Prior to *Crawford*, most courts permitted the award of expert witness fees in excess of \$30 per day to prevailing parties. See, e.g., *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983) (unanimous federal circuit authority states that attorneys' reasonable and necessary costs and expenses may be awarded to prevailing party pursuant to Section 1988 notwithstanding the limitation of 28 U.S.C. § 1920); *Ramos v. Lamm*, 713 F.2d 546, 559-60 (10th Cir. 1983) (where expert testimony was reasonably necessary, expert witness fees were compensable under Section 1988 and were not limited by 28 U.S.C. § 1920); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188-92 (11th Cir. 1983) (28 U.S.C. § 1920 does not preclude the award of travel, telephone and postage expenses pursuant to Section 1988); *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979) (reversing and remanding for recalculation of award of fees to include expert witness fees and counsels' travel expenses), *cert. denied*, 447 U.S. 911 (1980).

260. 482 U.S. at 439 (plaintiff sued under Title VII and 42 U.S.C. § 1981).

261. *Id.* at 445.

262. "I join the court's opinion and its judgment but upon the understanding that it does not reach the question whether, under 42 U.S.C. § 1988, a district court may award fees for an expert witness." *Id.* (Blackmun, J., concurring). The Supreme Court recently granted certiorari in a case which presents the precise issue of whether expert fees sought pursuant to Section 1988 are capped by the \$30 per day limit. *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1294 (1990) (No. 89-994).

263. E.g., *Friedrich v. City of Chicago*, 888 F.2d 511, 513 (7th Cir. 1989), *petition for cert. filed*, No. 89-1230 (Jan. 29, 1990); *SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988);

denied such fees pursuant to Section 1988 and similar statutes.²⁶⁴ All post-*Crawford* courts which have considered the question have denied expert witness fees exceeding the \$30 per day limit to prevailing plaintiffs seeking fees pursuant to Title VII.²⁶⁵

In *Denny v. Westfield State College*,²⁶⁶ the First Circuit suggested a means by which plaintiffs may circumvent the *Crawford* decision in order to recover at least a portion of the cost for expert assistance. *Denny* pointed out that *Crawford* limits the extent of reimbursement for expert testimonial time but does not directly address the extent of compensation for non-testimonial expert time.²⁶⁷ While plaintiffs in *Denny* did not argue that their expert's bill reflected anything but "her personal efforts in readying herself for, and giving, testimony,"²⁶⁸ the court suggested that plaintiffs might have been permitted to recover the cost of any time the expert devoted to investigative or other services rendered directly to plaintiffs' counsel.²⁶⁹ Plaintiffs may be able to take advantage of this suggested distinction in future cases.²⁷⁰

Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); United States v. Yonkers Bd. of Educ., 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

264. *West Virginia Univ. Hosps.*, 885 F.2d at 32 (expert fees may not be granted pursuant to Section 1988 in excess of \$30 per day), *cert. granted*, 110 S. Ct. at 1294; *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989) (reserving question of whether expert witness fees exceeding \$30 per day may be awarded under Section 1988, but noting that most courts have found Section 1988 and similar statutes insufficiently explicit to transfer costs of expert witnesses); *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir.) (per curiam) (affirming district court limitation of expert witness fees to \$30 per day in a Section 1988 case by equally divided court), *cert. denied*, 110 S. Ct. 57 (1989); *Seigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988) ("Section 1988 does not provide statutory authority for non-legal experts"); *Knop v. Johnson*, 712 F. Supp. 571 (W.D. Mich. 1989) (expert witness fees limited to \$30 per day for each day they appeared at a deposition or in court); *Shipes v. Trinity Indus., Inc.*, 685 F. Supp. 612 (E.D. Tex. 1987) (expert witness fees limited to \$30 per day in civil rights action), *appeal dismissed*, 883 F.2d 339 (5th Cir. 1989); *see also* *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir.) (Equal Pay Act does not allow award of expert witness fees), *cert. denied*, 488 U.S. 948 (1988); *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987) (prevailing party in eighth amendment suit regarding medical care not entitled to fees for tax expert witness), *cert. denied*, 485 U.S. 991 (1988); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) (Voting Rights Act does not authorize shifting of expert witness fees), *cert. denied*, 486 U.S. 1008 (1988).

265. *Denny*, 880 F.2d 1465; *Mennor v. Fort Hood Nat'l Bank*, 829 F.2d 553, 557 (5th Cir. 1987) ("The general language in a statute such as 42 U.S.C. § 2000e-5(k) may not be interpreted to authorize what is disallowed by the specific language of 28 U.S.C. § 1920."); *Noble v. Herrington*, No. CIV. A. 85-1507 (D.D.C. Feb. 14, 1989) (1989 WL 15881) (relying on *Crawford* to limit expert witness fees under Title VII).

266. 880 F.2d 1465 (1st Cir. 1989).

267. *Id.* at 1472.

268. *Id.*

269. *Id.* (citing *In re Air Crash Disaster*, 687 F.2d 626, 631 (2d Cir. 1982), as supporting the distinction between "statistical consulting costs" in preparing trial exhibits, which the Second Circuit held could be shifted under 28 U.S.C. § 1920(4), and "the expense of an expert's research and analysis in preparing for trial," which the Second Circuit held was not recoverable); *see also* *Missouri v. Jenkins*, 109 S. Ct. 2463, 2470 (1989) (a "reasonable attorney's fee" encompasses not only work performed personally by members of the bar but also work performed on behalf of such attorneys by others).

270. *But see* *Shipes v. Trinity Indus., Inc.*, 685 F. Supp. 612, 613 (E.D. Tex. 1987) (hold-

E. *The Few Pro-Plaintiff Decisions*

Despite the recent trend limiting the availability of attorney's fees for civil rights plaintiffs' attorneys, the Supreme Court has, in five recent decisions, let pass opportunities to limit further the availability of such fees. In fact, the language and rationale of these decisions are, in certain respects, inconsistent with the narrowing decisions discussed above. Perhaps these recent decisions will enable plaintiffs' attorneys and lower courts to protect civil rights counsel from the most dangerous interpretations of the Supreme Court's other attorney's fees decisions. But the decisions have significant limitations.

1. *Compensation for Delay in Payment and Recovery of Interim Fees*

In *Missouri v. Jenkins*,²⁷¹ a school desegregation suit, the Court explicitly stated that prevailing plaintiffs are entitled to "an appropriate adjustment for delay in payment."²⁷² As the Court explained: "Clearly, compensation received several years after the services were rendered — as it frequently is in complex civil rights litigation — is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings."²⁷³ The Court further ruled that even state defendants may be held liable for such delay multipliers, notwithstanding their claim of sovereign immunity.²⁷⁴ Additionally, *Jenkins* recognized the availability of interim fee awards when a litigant prevails on a particular issue during the course of litigation.²⁷⁵

The Court's rulings on delay²⁷⁶ and interim fees, however, are not complete victories for civil rights plaintiffs. The *Jenkins* decision did not explain how the delay enhancement should be calculated or when interim fees may be awarded.²⁷⁷ It simply stated that "an appropriate adjustment for delay in payment — whether by the application of current rather than historic hourly

ing that the Fifth Circuit, in *International Woodworkers Local 5-376 v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), *aff'd*, 482 U.S. 437 (1987), prohibited taxing defendant for any of the out-of-court services performed by the prevailing plaintiff's statistical and computer specialists, but noting that this rule "will invite attorneys on both sides of the civil rights bar to choose between engaging in economically inefficient litigation practices, or abandoning their work in this area of the law"), *appeal dismissed*, 883 F.2d 339 (5th Cir. 1989).

271. 109 S. Ct. 2463 (1989).

272. *Id.* at 2469.

273. *Id.* The Court further justified the award of delay compensation by noting that an attorney's expenses are not deferred pending completion of the litigation. The Court specifically noted that in the case at bar, plaintiffs' private attorney worked on the case for 12 years, was precluded from accepting other employment, and had borrowed \$633,000 to meet operating expenses, thereby incurring \$113,000 in interest payments alone. *Id.* at 2469 n.6.

274. The Court reasoned that if delay compensation is available as a general matter, and if, as the Court had previously ruled in *Hutto v. Finney*, 437 U.S. 678 (1978), states may be held liable for attorney's fees in suits seeking prospective relief, then attorneys may recover delay compensation from states. 109 S. Ct. at 2466-69.

275. 109 S. Ct. at 2469 n.6.

276. The Court in *Jenkins* approved a modest enhancer for delay, as well as other factors, of approximately 14% by awarding an hourly rate of \$200 instead of \$175. *Id.* at 2465-66.

277. *Id.* at 2463.

rates or otherwise — is within the contemplation of the statute.”²⁷⁸

The method of calculation, although glossed over by the Court, is crucial from the perspective of plaintiffs’ counsel. For example, in *Black Grievance Committee v. Philadelphia Electric Co.*,²⁷⁹ the district court accepted plaintiffs’ method of calculating their delay enhancer, which was based on compounded historic prime interest rates, and awarded the plaintiffs more than 100% of the *Hensley*-reduced and contingency-enhanced lodestar. By contrast, the use of current rather than historic interest rates would have yielded plaintiffs just \$128,410 over their lodestar, an enhancer of just 60%.²⁸⁰ Any interest denied plaintiffs’ counsel represents a real loss, since they may often be required to borrow large sums of money to keep their law firms afloat as they await attorney’s fee awards.²⁸¹ Thus, when plaintiffs are awarded a delay enhancer which is lower than that based on historic interest rates, counsel, besides being denied the reasonable fee to which they are entitled by statute,²⁸² must fully absorb the economic loss.

Similarly, although the Court in *Jenkins* authorizes the payment of interim fees,²⁸³ it does not mandate their payment. Thus, while some courts have ordered such awards,²⁸⁴ there is no guarantee interim fees will be paid to

278. *Id.* at 2469 (construing Section 1988).

279. 690 F. Supp. 1393 (E.D. Pa. 1988).

280. Plaintiffs’ Petition for Reasonable Attorneys Fees and Costs on Remand at 14, *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988) (No. CIV. A. 75-3156) (on file with Author). Had the court used inflation rates it would have awarded just \$110,536. Plaintiffs’ Petition at 15. The district court also held that plaintiffs were entitled to post-judgment interest, at the rate statutorily determined under 28 U.S.C. § 1961 (1988), for the period running from the date of the district court’s first fee award in 1985, until the fees were ultimately paid by defendant. 690 F. Supp. at 1405; see *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 655-56 (3d Cir. 1986) (delay damages cover period between rendering of services by plaintiffs’ counsel and issuance of fee award; statutorily determined post-judgment interest is appropriate for period between issuance of fee award by district court and payment of fees by defendant), *vacated*, 483 U.S. 1015 (1987).

281. See Amicus Brief, *supra* note 5 (discussing, inter alia, large debts incurred by plaintiffs’-side civil rights firms).

282. The Third Circuit has recognized that delay enhancers should generally be based on the lost time value of money, and thus on current interest rates. *Witco II*, 888 F.2d 975, 984 (3d Cir. 1989); *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1453 (3d Cir. 1988); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 923 (3d Cir. 1985); see also *Lattimore v. Oman Constr.*, 868 F.2d 437, 438 (11th Cir. 1989) (per curiam) (plaintiffs’ counsel awarded delay enhancement based on applying IRS prime rates to historical billing rates).

283. *Missouri v. Jenkins*, 109 S. Ct. at 2469.

284. *E.g.*, *Fadhl v. City & County of San Francisco*, 804 F.2d 1097, 1099 (9th Cir. 1986) (affirming and directing payment of undisputed portion of fee award while retaining jurisdiction over remainder of award pending decision), *aff’d*, 859 F.2d 649 (9th Cir. 1988); *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981) (interim fees awarded pending consideration of disputed fees on appeal); *McKenzie v. Kennickell*, 645 F. Supp. 437 (D.D.C. 1986) (plaintiffs entitled to interim fee award pending court’s determination of full amount of fees due); *Ramos v. Lamm*, 632 F. Supp. 376, 389 n.10 (D. Colo. 1986) (interim fees awarded for phase of successful multi-year litigation concerning prison conditions); see also *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339 (5th Cir. 1989) (interim fee award not appealable as either final or collateral order).

plaintiffs who request them.²⁸⁵

2. Fees Exceeding Monetary Award

In *City of Riverside v. Rivera*,²⁸⁶ the Court was asked to determine if court-awarded attorney's fees could exceed the dollar amount of the monetary award or settlement obtained by plaintiffs themselves. The plaintiffs in *Rivera* were awarded \$33,350 in compensatory and punitive damages, only \$13,300 of which was for their federal claims. They requested, however, a total of \$245,456.25 in attorney's fees.²⁸⁷ While plaintiffs initially sought declaratory relief in their complaint, they ultimately did not request, and the district court did not award, such relief.²⁸⁸ Plaintiffs argued that they were entitled to their full *Hensley*-adjusted lodestar, and that there should be no link between the dollar amount of the relief obtained and the dollar amount of the fees awarded.

Defendant essentially responded that fee litigation should not be permitted to become a tail that wags the dog of civil rights litigation. Even if the district court's *Hensley* analysis showed that the hours spent by plaintiffs' counsel were reasonably related to the results obtained, the defendant asserted, it was ridiculous and unfair to expect a defendant to pay far more in fees than the case was worth on the merits.²⁸⁹ Joined by the Solicitor General, as *amicus curiae*, defendant argued that where plaintiffs recover only monetary damages, the fee awards should be modeled upon contingent fee arrangements commonly used in personal injury litigation, such that plaintiffs' counsel would be entitled to just 33% of the award.²⁹⁰

The Supreme Court, in a 5-4 decision, rejected defendant's argument. However, only four Justices joined in the Court's opinion, with Justice Powell concurring on narrower grounds.²⁹¹ The plurality opinion strongly supports awarding reasonable attorney's fees to plaintiffs' counsel in civil rights cases without reference to the damages award. As a threshold matter, the plurality harshly refuted the idea of parallel fee models in civil rights and personal injury litigation, stating that "we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated."²⁹² The plurality explained:

Unlike most private tort litigants, a civil rights plaintiff seeks to vin-

285. *Black Grievance Comm.*, 690 F. Supp. 1393 (exercising discretion to deny interim fees to prevailing plaintiffs).

286. 477 U.S. 561 (1986).

287. *See id.* at 564-65.

288. Plaintiffs claimed they did not seek declaratory relief because all they could have obtained was an order requiring the police to obey the law. The district court stated that had declaratory relief been sought, it would have been awarded. *See id.* at 565 n.1 & 575 n.7.

289. *See id.* at 573-74.

290. *See id.*

291. *Id.* at 561.

292. *Id.* at 574.

dicating important civil and constitutional rights that cannot be valued solely in monetary terms. . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.²⁹³

The plurality added that “[b]ecause damage awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief.”²⁹⁴ Moreover, “Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.”²⁹⁵ Civil rights victims often have little or no money with which to hire a lawyer and, moreover, “the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries.”²⁹⁶ The plurality concluded that a rule requiring proportionality between the attorney’s fees and the damages awarded to plaintiffs must be rejected, since such a rule “would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.”²⁹⁷

Justice Powell’s concurrence was based on the narrower ground that in the particular case at bar an important public interest was served above and beyond the mere award of monetary relief.²⁹⁸ He stressed, however, that grossly disproportional fee awards should be the exception rather than the rule, stating that “[i]t probably will be the rare case in which an award of private damages can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.”²⁹⁹ In light of the fact that this concurrence supplied the crucial fifth vote, plaintiff’s counsel cannot count on being awarded their full fee where they obtain relatively small monetary awards for their clients.

3. Fees Exceeding Contingent Agreement

Two and a half years later, in *Blanchard v. Bergeron*,³⁰⁰ the Court ad-

293. *Id.* For example, the Court noted that damages obtained by a plaintiff may significantly deter future civil rights violations against others. *Id.* at 574-75.

294. *Id.* at 575.

295. *Id.* at 576.

296. *Id.* at 577.

297. *Id.* at 578.

298. *Id.* at 585-86 (Powell, J., concurring).

299. *Id.* at 586 n.3; see *Sas v. Trintex*, 709 F. Supp. 455 (S.D.N.Y. 1989) (fee should resemble amount awarded plaintiff in settlement on the merits where plaintiff’s claim of discriminatory discharge on basis of religion was mere claim for money, not for vindication of constitutional rights).

300. 109 S. Ct. 939 (1989).

dressed another troubling issue in the field of attorney's fee litigation: "whether an attorney's fee allowed under Title 42 U.S.C. § 1988 is limited to the amount provided in a contingent fee arrangement entered into by plaintiff and his counsel."³⁰¹ Plaintiff Arthur J. Blanchard was awarded \$5,000 in compensatory damages and \$5,000 in punitive damages on his claim that he was beaten by Sheriff's Deputy James Bergeron.³⁰² Blanchard's attorneys sought fees and costs totaling more than \$40,000, but the district court awarded less than \$9,000.³⁰³ The Fifth Circuit reduced the award to \$4,000 on the ground that the attorneys entered into a contingent fee agreement which entitled them to only 40% of any damages, should Blanchard prevail in his suit.³⁰⁴

A unanimous Supreme Court reversed, holding that while courts may consider the contingent fee contract in determining an appropriate fee award, the existence of such a contract "does not impose an automatic ceiling on an award of attorney's fees."³⁰⁵ The Court explained that applying the contingent fee agreement as an automatic ceiling "would be inconsistent with the statute and its policy and purpose."³⁰⁶ Specifically, the Court found that "[i]t is clear that Congress 'intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be non-pecuniary in nature.'³⁰⁷ The Court explicitly recognized that "[i]f a contingent fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation."³⁰⁸ Congress sought to encourage civil rights litigation generally, according to the Court, not to favor those suits which sought damages over those primarily seeking injunctive relief.³⁰⁹

The Court rejected defendant's argument that permitting plaintiff's attorneys to recover more fees than those negotiated in their contingent fee agreement would result in a windfall to plaintiff's attorneys, since the various attorney's fees precedents would assure plaintiff's counsel only a "reasonable"

301. *Id.* at 941. The Court noted a split in the circuits on this issue. Compare *Blanchard v. Bergeron*, 831 F.2d 563, 564 (5th Cir. 1987) (contingent fee agreement "serves as a cap on the amount of attorney's fees to be awarded"), *rev'd*, 109 S. Ct. 939 (1989) with *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1393 (7th Cir. 1984) (contingency enhancement not adequately reflected in contingent fee agreement where damages are low); *Sisco v. J.S. Alberici Constr. Co., Inc.*, 733 F.2d 55, 56 (8th Cir. 1984) (contingent fee agreement provides no limit) and *Cooper v. Singer*, 719 F.2d 1496, 1507 (10th Cir. 1983) (en banc) (fee award should not be limited by contingent fee agreement).

302. *See* 109 S. Ct. at 942.

303. *See id.*

304. *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987).

305. 109 S. Ct. at 944.

306. *Id.* (interpreting Section 1988).

307. *Id.* at 945 (omissions in original) (quoting S. REP. NO. 1011, *supra* note 154, at 5913).

308. *Id.*

309. *Id.*

fee.³¹⁰

4. *Private Fee Agreements*

One year after *Blanchard*, in *Venegas v. Mitchell*,³¹¹ the Court addressed the related question of whether an attorney may use a private fee agreement with her client to collect a fee in excess of the fee awarded by a court. The question was a crucial one for plaintiffs' counsel, because they have become dependent upon such agreements to supplement the often inadequate court-awarded fees.

A unanimous Court, using a freedom of contract analysis, found that "there is nothing in [Section 1988] to regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win."³¹² Thus plaintiff's counsel, who was awarded just \$75,000 by the lower court, was permitted to enforce the fee agreement granting him 40% of the \$2.08 million award he had secured for his client.³¹³

The Court stated that "[t]he aim of [Section 1988], as our cases have explained, is to enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail."³¹⁴ However, the Court demonstrated its total lack of understanding of the economics of plaintiffs' civil rights cases when it stated: "It is likely that in many, if not most, cases a lawyer will undertake a civil rights case on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won."³¹⁵ In fact, lawyers who have tried to structure their practices in this manner have met with financial disaster.³¹⁶

5. *Fees to Plaintiff Prevailing on Non-Major Issue*

In *Texas State Teachers Association v. Garland Independent School District*,³¹⁷ a unanimous Court held that where a civil rights plaintiff prevails on any significant issue, even if it is not the most significant or central issue in the case, she is a "prevailing" party entitled to reasonable attorney's fees.³¹⁸ Plaintiffs in the *Texas State* suit were state and local teachers' associations and several of their members and employees. They brought suit under 42 U.S.C.

310. *Id.* at 946.

311. 110 S. Ct. 1679 (1990).

312. *Id.* at 1682.

313. *See id.* at 1681.

314. *Id.* at 1682.

315. *Id.*

316. *See supra* notes 5 & 7.

317. 109 S. Ct. 1486 (1989).

318. *Id.* at 1493. This holding resolved a split among the circuits. *See id.* at 1489 (comparing *Simien v. San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987) and *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc) (both requiring that party prevail on central issue and achieve primary relief sought to obtain fees) with *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984) and *Lampher v. Zagel*, 755 F.2d 99, 102 (7th Cir. 1985) (both requiring only that party succeed on a significant issue and receive some of the relief sought to obtain fees)).

Section 1983 alleging that the school district's policy prohibiting certain communications with teachers, particularly by employee organizations, violated their constitutional rights under the first and fourteenth amendments.³¹⁹

The district court rejected most of plaintiffs' claims, only invalidating the requirement that the school's principal approve after-school meetings between teachers and union representatives.³²⁰ On appeal, the Fifth Circuit reversed in part the district court's dismissal of the plaintiffs' other asserted claims.³²¹ However, the court of appeals agreed with the lower court that the school district was not constitutionally required to grant union representatives access to school facilities during school hours.³²² The Fifth Circuit's rulings were affirmed by the Supreme Court.³²³

Plaintiffs subsequently filed a petition for reasonable attorneys' fees and costs in the district court.³²⁴ While recognizing that plaintiffs had achieved partial success, the court rejected the claim for fees on the ground that plaintiffs, having failed to prevail "on the *central issue* by acquiring the primary relief sought," were not "prevailing parties" within the meaning of 42 U.S.C. § 1988.³²⁵ The Fifth Circuit affirmed.³²⁶

The Supreme Court rejected the lower courts' definition of "prevailing parties." It stated that "the 'central issue' test applied by the lower courts here is directly contrary to the thrust of our decision in *Hensley*."³²⁷ The Court also found the "central issue" test inconsistent with the legislative history of Section 1988 and unwise as a matter of policy, since it would require parties to engage in extensive and excruciating litigation over which issue or issues were "central" to the litigation.³²⁸ Instead, the Court ruled that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind."³²⁹ In the Court's view, the *Hensley* reducer would ensure that a party who prevailed on only a few issues would not receive a larger fee than was reasonable in light of the degree of success.³³⁰

While the *Texas State* decision has generally been seen as a victory for plaintiffs' counsel, the opinion also contains sobering language for plaintiffs-

319. See 109 S. Ct. at 1489.

320. See *id.* at 1490.

321. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 777 F.2d 1046 (5th Cir. 1985).

322. *Id.* at 1052.

323. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 479 U.S. 801 (1986).

324. See 109 S. Ct. at 1490.

325. See *id.* at 1490-91 (emphasis in original) (citing *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, No. 87-1221 (N.D. Tex. 1987)).

326. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 837 F.2d 190 (5th Cir. 1988).

327. 109 S. Ct. at 1492, *rev'g* 837 F.2d 190 (5th Cir. 1988).

328. *Id.* at 1492-93.

329. *Id.* at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

330. *Id.* at 1492.

side civil rights attorneys. The Court stated that where a plaintiff's victory is merely "technical" or "insignificant," the plaintiff is not a prevailing party and therefore not entitled to any fees.³³¹ The Court explained that "at a minimum, to be considered a prevailing party within the meaning of Section 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."³³²

This language alone would not be so troubling had the Court not provided an unsettling example of a case in which a plaintiff would not be entitled to recover any fees. Drawing on the facts from the *Texas State* litigation itself, the Court announced that had plaintiffs ultimately prevailed only on the issue which succeeded in district court — the overturning of the school district policy which required the principal's approval for after-school meetings between teachers and unions — they would not have been prevailing parties under Section 1988.³³³ Noting that the district court found no evidence that plaintiffs had ever been denied permission to hold an after-school meeting, and that the district court characterized the issue as "of minor significance," the Court stated it was "clear" that such success alone would not entitle plaintiffs to prevailing party status under Section 1988.³³⁴ "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."³³⁵ Once again, the Court, while purporting to be charitable in its grant of attorney's fees to civil rights plaintiffs, actually provided defendants and lower courts with a significant weapon for both limiting plaintiffs' fees and complicating fee litigation.

6. Compensation for Paralegal Work at Market Rates

In *Missouri v. Jenkins*,³³⁶ the Court ruled that plaintiffs' counsel may bill for the time expended by paralegals and law clerks at market rates. Defendants argued that plaintiffs were entitled, at most, to compensation for such expenditures at cost rather than at market rates.³³⁷ The Supreme Court rejected the argument, reasoning that "[c]learly a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney."³³⁸ The Court further explained that because prevailing civil rights plaintiffs are entitled to "a fully compensatory fee, comparable to what is traditional with attorneys compensated by a fee-paying cli-

331. *Id.* at 1493.

332. *Id.* at 1493.

333. *Id.*

334. *Id.*

335. *Id.*

336. 109 S. Ct. 2463 (1989).

337. *See id.* at 2469. Defendants calculated that the actual cost of the clerk and paralegal time, including overhead, was \$15 per hour. Plaintiffs' counsel had billed the time at rates between \$35 and \$50 per hour.

338. *Id.* at 2470.

ent,"³³⁹ prevailing plaintiffs may follow the practice of the market with regard to the billing of paralegal time.³⁴⁰ "Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at 'cost.'"³⁴¹

In sum, the Supreme Court has, in certain recent decisions, passed up various opportunities to limit further the fees payable to prevailing plaintiffs. While these decisions may prove useful in the fight for attorney's fees, they also have significant limitations and could, in some circumstances, effectively reduce, or deny altogether, plaintiffs' counsel's compensation.

II.

THEORETICAL AND PRACTICAL FLAWS IN THE SUPREME COURT'S ANALYSIS OF CIVIL RIGHTS ATTORNEY'S FEES

Despite the Supreme Court's purported support for the award of reasonable attorney's fees and costs to prevailing civil rights plaintiffs, it has nonetheless issued many decisions which virtually guarantee that plaintiffs' counsel will come out "in the red." This Section discusses the theoretical flaws in the Court's reasoning and demonstrates how the Court's decisions have been applied to prevent plaintiffs' civil rights attorneys from practicing on an economically viable basis.

There are three major flaws in the Supreme Court's analysis of civil rights attorney's fees cases. First, the Court's emphasis on the lodestar as a presumptively reasonable fee ensures that plaintiffs' civil rights counsel will be compensated far less generously than other attorneys. Second, the Court vacillates between setting fees designed to attract high caliber counsel and setting fees sufficient to attract merely any attorney. The Court's recent decisions mark a trend in the latter direction. Third, the jurisprudence of fee litigation has now become so complex that it is impossible for plaintiffs' counsel to secure fair and speedy compensation. The cumulative effect of these analytic flaws is that plaintiffs' attorneys are, in effect, economically forced to abandon civil rights litigation, leaving plaintiffs with no adequate representation.

A. *The Flawed Lodestar Approach*

Since its *Hensley* decision in 1983, the Supreme Court has emphasized that the "lodestar," the product of the hours reasonably expended by plaintiffs' counsel multiplied by the reasonable hourly rate, constitutes a presumptively reasonable starting point for calculation of attorney's fees.³⁴² At first

339. *Id.* (citations omitted).

340. *Id.* at 2470-71.

341. *Id.* at 2471.

342. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

blush, the Court's emphasis on the lodestar might appear to be sensible and even generous. After all, the lodestar is the sum a typical defense attorney would charge her clients. In reality, however, plaintiffs'-side civil rights attorneys are not compensated as highly as their defense counterparts.³⁴³ Whereas defense attorneys almost always receive their full lodestar, win or lose, shortly after they have provided their services,³⁴⁴ plaintiffs' civil rights attorneys face a labyrinth of hurdles and barriers before they can collect even a tiny portion of their lodestar. In addition, with each case they undertake a significant contingent risk which defense attorneys do not; they can expect compensation only when and if they win in court, and not necessarily when they settle. The settlement context is particularly significant because far more civil rights cases settle than go to trial. Plaintiffs' attorneys may find their fees bargained away by their clients or, at the least, severely reduced under the terms of defendants' settlement offers.³⁴⁵

When plaintiffs' attorneys do win in court, numerous reductions in the lodestar are inevitably imposed by the courts. To make matters worse, courts often start with the lodestar as a ceiling, and then reduce the fee, sometimes by as much as 85%,³⁴⁶ to what they consider a more appropriate award. Reductions are achieved by denying compensation for hours spent on the administrative process,³⁴⁷ on issues or arguments upon which plaintiffs do not prevail,³⁴⁸ and, most significantly, on the litigation as a whole if the court feels the results do not warrant the fee.³⁴⁹ The hourly rate requested by plaintiffs' counsel is also typically reduced, unless counsel can justify, through documentation, the reasonableness of the rate in terms of the comparable legal community.³⁵⁰ Producing such documentation poses a challenge for many full-time civil rights attorneys, since they conduct their entire practice on a contingent fee basis, and thus cannot easily present the court with paid hourly bills establishing the value of their time.

If counsel has managed to overcome the foregoing obstacles, they must then endure excruciating delays before actually receiving payment of their court-awarded fee, which is, by now, invariably a small fraction of the amount originally requested.³⁵¹ Moreover, defendants may continue the appeals pro-

343. See Amicus Brief, *supra* note 5, at 5 n.1 (citing *Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 46, 53, 54 (1982) (statement of Fletcher Farrington); *Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 379-81, 388 (1984) (statement of Charles V. McTeer); J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 116 (1978)).

344. See *Missouri v. Jenkins*, 109 S. Ct. 2463, 2469 (1989) (defense attorneys normally receive their fees promptly after the services are performed).

345. See *supra* text accompanying notes 215-54.

346. See *supra* note 30.

347. See *supra* text accompanying notes 39-63.

348. See *supra* text accompanying notes 25-29, 34-36 & 64-75.

349. See *supra* notes 23-36 and accompanying text.

350. See *supra* notes 96, 100-02 and accompanying text.

351. See *supra* text accompanying notes 30-32 & 211-13.

cess, meaning that plaintiffs' counsel could have to wait even longer for their fees.³⁵² Finally, plaintiffs' counsel may have to use a portion of their fee to pay for expert witness costs not awarded by the court.³⁵³

Thus, from the perspective of the plaintiffs' civil rights attorney, the lode-star is both insufficient and unobtainable. Theoretically, contingency and delay enhancers are available to ensure that plaintiffs' counsel are reasonably compensated, notwithstanding the perils of litigation. In reality, however, judges do not award sufficient enhancers, treating them as a bonus to be handed out sparingly. Rather than starting with the assumption that plaintiffs' counsel are entitled to a contingency enhancement of at least 100%, which would appear to be the minimum necessary to compensate plaintiffs' counsel for the fact that they can expect to lose at least half of their cases,³⁵⁴ courts apparently regard such compensation as extremely generous and perhaps too high.³⁵⁵

The Supreme Court plurality opinion in *Delaware Valley II*³⁵⁶ is an example of illogical analysis guaranteed to render the plaintiffs' attorney's practice of civil rights law economically infeasible. While recognizing the need for fee-shifting statutes, the plurality nonetheless concludes that those statutes do not permit the use of "multipliers or other enhancement of a reasonable lode-star fee to compensate for assuming the risk of loss"³⁵⁷ The plurality presented a number of policy rationales that, in the Justices' view,³⁵⁸ are inconsistent with the award of a contingency multiplier: enhancing fees for risk of loss forces defendants to compensate plaintiffs' lawyers for not prevailing in other cases; enhancement penalizes those defendants with the strongest cases; enhancements are difficult to calculate in advance and thus will rarely encourage plaintiffs' counsel to take on a risky case; and enhancements are necessary only in a limited category of civil rights cases — those in which the plaintiff cannot afford to pay an attorney on an hourly basis and cannot expect to win sufficient damages to fund the litigation.³⁵⁹

However, faulty reasoning, not these policy justifications, convinced the plurality to reject the contingency multiplier. Specifically, the plurality contended that "[t]he reasons a particular lawsuit are [sic] considered to be 'risky' for an attorney are because of the novelty and difficulty of the issues presented,

352. See *supra* text accompanying notes 272-85 and *infra* text accompanying notes 386-411.

353. See *supra* text accompanying notes 255-69.

354. See Leubsdorf, *supra* note 4 (advocating 100% contingency enhancement in all cases).

355. See, e.g., *supra* note 214 and *infra* text accompanying notes 364-67. But see King v. Palmer, 906 F.2d 762 (D.C. Cir. 1990) (100% contingency enhancer shall be awarded in all future District of Columbia Circuit cases, absent new evidence or legislation).

356. 483 U.S. 711 (1987).

357. *Id.* at 727.

358. *Id.* at 722.

359. *Id.* at 725. The plurality offered no statistical information regarding the number of civil rights cases involving sufficient damages to fund contingent fee litigation.

and because of the potential for protracted litigation."³⁶⁰ An attorney's success in such a case, the Court asserted, is attributable to her skills and experience, as well as to the hours she expended on the litigation.³⁶¹ In an illogical tour de force, the plurality went on to state that the factors of skill, experience, and hours expended are already reflected in the reasonable lodestar. Thus, adding a contingency multiplier to the lodestar, so the reasoning goes, would result in a windfall to plaintiffs' counsel.³⁶²

The Court's view is completely divorced from reality in that it fails to acknowledge that the lodestar is based on a noncontingent fee scale.³⁶³ That is, the lodestar represents the sum received by defense attorneys, regardless of the outcome of the case. It does not account, therefore, for the risk of nonpayment that plaintiffs' counsel are forced to assume. For example, based on the optimistic assumption that plaintiffs' civil rights counsel win 50% of their cases and are compensated in those cases for 80% of the hours they worked, their compensation would equal approximately 40% of the fee received by their defense counterparts. The Court's warped analysis will only perpetuate unjust fee awards in civil rights cases and, in turn, force plaintiffs' counsel to abandon such cases altogether.³⁶⁴

Justice White's opinion in *Delaware Valley II* presented another seriously flawed analysis regarding the permissible size of a multiplier. The plurality concluded that even where a district court finds there was a significant risk of not prevailing, it should not, as a general rule, award an enhancement greater than one-third of the lodestar.³⁶⁵ According to the plurality, "[t]his limitation will at once protect against windfalls for attorneys and act as some deterrence against bringing suits in which the attorney believes there is less than a 50-50 chance of prevailing."³⁶⁶

A one-third enhancement (equal to 133% of the lodestar) would hardly suffice as compensation for taking cases with a 50% chance of success, particularly given that the lodestar will inevitably have been dramatically reduced already by the court.

While the Supreme Court's 33% enhancement figure is purportedly designed to inspire plaintiffs' counsel to accept only those cases with the great-

360. *Id.* at 726.

361. *Id.*

362. *Id.* at 726-27.

363. See *Leading Cases*, *supra* note 1, at 297 n.59.

364. See, e.g., *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963) (stating "[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"), *modified and aff'd sub nom. Green v. Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964); see also *Leading Cases*, *supra* note 1, at 298-99 (*Delaware Valley II* creates economic barriers that threaten to terminate private enforcement of laws and will either penalize experienced attorneys who take such cases or "relegate the vindication of federal rights to less experienced or less able attorneys who are unable to demand market rates").

365. 483 U.S. at 730.

366. *Id.*

est likelihood of success,³⁶⁷ this goal may well prove unreachable. It is nearly impossible for a plaintiffs' attorney to predict her chances of success in a particular case with accuracy. At the point when an attorney decides whether to take a case, she can only guess as to the nature of the defendant's defenses, the identity of witnesses and the availability of helpful or harmful documents. While the 33% rule would certainly make plaintiffs' counsel more hesitant to accept civil rights cases, it is doubtful that the rule will result in their improved selection of cases.

B. *A Conflict of Philosophies*

The Supreme Court's decisions regarding attorney's fees reveal two conflicting philosophies concerning the quality of representation to which civil rights plaintiffs are entitled. Certain decisions stress that civil rights plaintiffs have a right to competent and experienced representation, and that fee awards, therefore, must be commensurate with fees paid to attorneys handling complex private litigation. However, in other decisions the Court suggested that civil rights plaintiffs require neither the highest caliber nor the highest paid counsel, but merely minimally competent attorneys. The lower federal courts, following the Supreme Court's equivocal lead, have also wavered between the dual standards of excellence and minimal competence. Recently, however, the concept of minimal competence appears to be gaining ground.

In *Blum v. Stenson*,³⁶⁸ the Supreme Court espoused the notion that civil rights plaintiffs are entitled to attorneys of the highest caliber. Legal services attorneys, a unanimous Court held, unquestionably should be paid at prevailing rates in the relevant community, rather than at cost. The Court quoted legislative history which has become the rallying cry for plaintiffs' civil rights attorneys seeking fees: "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."³⁶⁹ The Court ruled that the fee applicant bears the burden of demonstrating that the requested fees are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."³⁷⁰ Thus, under *Blum*, a highly competent and experienced public interest attorney would be awarded fees at the rate paid to a comparably experienced attorney in the private market.

The *Blum* philosophy was recently reaffirmed by the Court's decision in

367. See *supra* text accompanying notes 135-54 (discussing *Delaware Valley II*, 483 U.S. 711 (1987)).

368. 465 U.S. 886 (1984).

369. *Id.* at 893-94 (alterations in original) (quoting S. REP. NO. 1011, *supra* note 154, at 5913). This legislative history was cited one year earlier by Justice Brennan in his dissent in *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983).

370. 465 U.S. at 896 n.11.

Blanchard v. Bergeron.³⁷¹ Justice White, joined by seven other Justices and by Justice Scalia in concurrence, cited to *Blum* for the proposition that civil rights fees are to be governed by the same standards prevailing in equally complex Federal litigation.³⁷² The Court in *Blanchard* stressed that permitting a contingent fee agreement to limit the extent of court-awarded fees would deprive civil rights plaintiffs of adequate representation and is thus forbidden.³⁷³

Numerous post-*Blum* decisions have, however, moved away from the concept that civil rights attorneys are entitled to the same level of compensation as private attorneys who handle other kinds of federal litigation. In stark contrast to *Blum* is the Court's holding in *Delaware Valley I*³⁷⁴ where a 6-3 majority stated that

[the fee-shifting] statutes were not designed as a form of economic relief to improve the financial lot of attorneys nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied.³⁷⁵

In other words, fees need not be set sufficiently high so as to guarantee civil rights plaintiffs the highest quality representation as long as they can obtain some kind of legal help. The Court suggested that each attorney's ethical obligation to provide the best representation she can will adequately protect the interests of civil rights plaintiffs.³⁷⁶

Many of the Court's recent decisions implicitly adopt the *Delaware Valley I* "any attorney will do" philosophy. In *Delaware Valley II*,³⁷⁷ the White plurality stated that no contingency multiplier is necessary if plaintiffs can, without such a multiplier, obtain representation by paying for it themselves, by securing assistance from public interest organizations, or by securing the assistance of underemployed attorneys.³⁷⁸ While asserting that plaintiffs are entitled to "competent" representation, the plurality failed to define the term. In the cases of *Webb v. Board of Education*,³⁷⁹ *Evans v. Jeff D.*,³⁸⁰ *Hewitt v.*

371. 109 S. Ct. 939 (1989).

372. *Id.* at 945.

373. *Id.* at 944-46.

374. 478 U.S. 546 (1986).

375. *Id.* at 565.

376. *Id.* at 540.

377. 483 U.S. 711 (1987).

378. *Id.* at 726.

379. 471 U.S. 234 (1985).

380. 475 U.S. 717 (1986).

Helms,³⁸¹ and *Marek v. Chesny*,³⁸² the Court did not directly address the issue of comparable compensation for civil rights attorneys, but implicitly rejected such a philosophy. These decisions deny civil rights attorneys compensation by forbidding payment for hours spent on administrative proceedings and on cases which resulted in a mere favorable statement of law and not damages, and by permitting defendants to force plaintiffs to waive attorney's fees and to accept offers of judgment. Because no such limitations apply to other attorneys' fees, these rulings further devalue the work of plaintiffs'-side civil rights lawyers and, in turn, deter many highly competent attorneys from taking civil rights cases.

Lower courts, following the Supreme Court's wavering lead, have failed to adopt a consistent approach to the issue of whether civil rights plaintiffs are entitled to an attorney whose abilities are comparable to those of highly paid private attorneys. For example, in *Student Public Interest Research Group v. AT&T Bell Laboratories*,³⁸³ the Third Circuit awarded plaintiffs' counsel prevailing market rates but proclaimed that since attorneys who work for public interest firms may receive "psychological benefit" from their work, high salaries, such as those paid to attorneys in the private market, may not be necessary to attract competent counsel to civil rights litigation.³⁸⁴ This "work for love not money" concept is at odds with the Supreme Court's decisions in *Blum* and *Blanchard*.

In sum, the Supreme Court's refusal to endorse consistently the philosophy of economic equality between civil rights attorneys and private attorneys, has relegated the former to second class status. As a result, civil rights plaintiffs may have to settle for representation by attorneys who, while perhaps minimally competent, are not necessarily as experienced or qualified as their private market counterparts.³⁸⁵

C. *The Problem of Delay*

The third reason plaintiffs'-side civil rights attorneys are consistently underpaid is that fee litigation itself has become a virtually interminable morass.³⁸⁶ Given the length and complexity of fee litigation it is impossible for civil rights attorneys to obtain fair and speedy compensation for their victories.

381. 482 U.S. 755 (1987).

382. 473 U.S. 1 (1985).

383. 842 F.2d 1436 (3d Cir. 1988).

384. *Id.* at 1448.

385. Obviously the attorneys who charge the highest rates are not necessarily more competent than attorneys who charge lower rates. Nonetheless, it is clear that if courts refuse to pay the same rates to civil rights counsel as those attorneys could earn in other complex cases, many highly competent attorneys will be deterred from the practice.

386. *Cf.* C. DICKENS, *BLEAK HOUSE* 146 (1971) (discussing interminable litigation over costs) ("[T]hrough years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it.").

For example, in *Black Grievance Committee v. Philadelphia Electric Co.*, plaintiffs initially filed a race discrimination class action suit in 1975. Although the case settled on the eve of trial in 1983, the district court did not award fees until 1985.³⁸⁷ The defendant appealed the award to the Third Circuit which, in 1986, vacated and remanded the matter for reconsideration on several issues.³⁸⁸ Still dissatisfied, the defendant sought a writ of certiorari to the Supreme Court which, in 1987, vacated and remanded the matter for reconsideration³⁸⁹ in light of its recently decided opinion in *Delaware Valley II*.³⁹⁰ The parties filed new briefs and affidavits with the district court which issued a second, slightly higher fee award in 1988.³⁹¹ Once again the defendant appealed to the Third Circuit, this time raising fifteen issues for the court's consideration.³⁹² Ultimately, following a full briefing by both parties as well as the submission of an amicus curiae brief by the EEOC, the fee case settled in 1988 and the attorneys finally received some payment for the work they had commenced in 1975.³⁹³ Unfortunately, the path followed by this case is not unique in fee litigation.³⁹⁴

The courts at all levels have expressed great dismay with the interminable quality of fee litigation. In *Hensley v. Eckerhart*, the Supreme Court announced that "[a] request for attorney's fees should not result in a second major litigation."³⁹⁵ Instead, the Court urged, the parties should settle fee disputes amicably among themselves.³⁹⁶ Many other frustrated courts³⁹⁷ and

387. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 615 F. Supp. 1069 (E.D. Pa. 1985).

388. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648 (3d Cir. 1986).

389. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 483 U.S. 1015 (1987).

390. 483 U.S. 711 (1987).

391. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa. 1988). The amount of the second fee award was \$500,395. *Id.* at 1408. The original award, issued by the district court in 1985, was \$464,950. 615 F. Supp. at 1080-81.

392. Brief for Philadelphia Electric Company, Appellant and Cross-Appellee, *Black Grievance Comm. v. Philadelphia Elec. Co.*, Nos. 88-1564 & 88-1571 (3d Cir.), *appealing* 690 F. Supp. 1393 (E.D. Pa. 1988) (No. 75-3156).

393. The terms of the settlement are confidential. Interview with Alice W. Ballard, Esq., attorney for plaintiff class, in Philadelphia (Oct. 15, 1990).

394. For example, *Blum v. Witco Chemical Corp.* was a relatively straightforward age discrimination suit brought by three research chemists against their employer. The jury found for the plaintiffs, and the district court, applying a contingency multiplier, awarded \$135,977.40 in attorneys' fees. The defendant appealed the fee award on various grounds, and the Third Circuit reversed and remanded for reconsideration of the contingency multiplier in light of *Delaware Valley II*. *Witco I*, 829 F.2d 367 (3d Cir. 1987). On remand, the matter was initially considered by a magistrate and then by the district court, which issued a second fee award in 1988. *Blum v. Witco Chem. Corp.*, 702 F. Supp. 493 (D.N.J. 1988). This award was appealed by defendant to the Third Circuit which reversed the award of a contingency multiplier. *Witco II*, 888 F.2d 975 (3d Cir. 1989); *see also Delaware Valley II*, 483 U.S. 711 (1987) (second Supreme Court opinion on underlying fee dispute).

395. 461 U.S. 424, 437 (1983); *see also id.* at 442 (Brennan, J., concurring).

396. *Id.* at 437.

397. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (noting that instant fee litigation had already spanned three years and urging the parties "not to unduly prolong what is already 'a second major litigation'" (citing *Hensley*, 461 U.S. at

equally frustrated litigants³⁹⁸ have echoed this call for restraint in fee disputes. Yet the law books are replete with lengthy fee decisions by district and appellate courts.

It is neither obstinance nor ineptitude which has led plaintiffs to file extensive attorney's fees petitions and defendants to oppose such petitions vehemently with lengthy briefs and appeals. Extensive fee litigation is inevitable given the complicated nature of its rapidly changing law, as well as the economic incentives for defendants to delay payment as long as possible.

Attorney's fee litigation has evolved into an extremely complex body of law. There are numerous ingredients to the fee award, each of which is subject to differing interpretations. For example, parties can wage battles over the appropriate hourly rate,³⁹⁹ the compensability of particular hours,⁴⁰⁰ whether plaintiff was the prevailing party with respect to certain or sufficient issues,⁴⁰¹ whether various expenditures are compensable as costs,⁴⁰² the extent to which plaintiff's counsel should be compensated for delay in payment,⁴⁰³ whether plaintiff's counsel is entitled to any enhancers,⁴⁰⁴ and the order in which such factors can or must be calculated into the fee.⁴⁰⁵ Each issue alone could easily be the subject of pages and pages of evidentiary presentation and legal argument.

Additionally, the courts have willingly jumped into the fray of attorney's fee litigation. Although the standard of review theoretically requires appellate courts to defer substantially to findings of the district courts,⁴⁰⁶ appellate courts frequently reverse lower court fee decisions in whole or in part, remanding such matters to the district courts for further evidentiary and legal findings.⁴⁰⁷ Of course in the interim, while a matter is on appeal, a new Supreme Court fee decision might be handed down, requiring additional evi-

437)); *see also* *Webb v. Board of Educ.*, 471 U.S. 234, 243-44 nn.19 & 20 (1984); *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 651 (3d Cir. 1986), *vacated*, 483 U.S. 1015 (1987).

398. *See generally* *Amicus Brief*, *supra* note 5 (discussing repercussions of long, drawn out civil rights litigation on small plaintiffs'-side firms).

399. *See supra* text accompanying notes 95-114.

400. *See supra* text accompanying notes 18-94.

401. *See supra* text accompanying notes 64-75 & 317-35.

402. *See supra* text accompanying notes 215-30 & 255-69.

403. *See supra* text accompanying notes 271-85 & 386-411.

404. *See supra* text accompanying notes 115-214.

405. *See, e.g.*, *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 656 (3d Cir. 1986) (district court must first apply result-obtained adjustment to the lodestar, then add other adjustments together and finally multiply that combined factor by the result-obtained adjusted lodestar), *vacated*, 483 U.S. 1015 (1987).

406. In general, fee awards are to be reviewed under an abuse of discretion standard. *See* *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also* *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 909 n.21 (3d Cir. 1985) (factual findings reviewed under a "clearly erroneous" standard, and legal findings reviewed on a plenary basis); *Black Grievance Comm.*, 802 F.2d at 651 (determination of fee is primarily left to discretion of district court).

407. *See, e.g.*, *Witco I*, 829 F.2d at 367, *remanded*, 702 F. Supp. 493 (D.N.J. 1988); *Black Grievance Comm.*, 825 F.2d 768 (3d Cir. 1987), *remanded*, 690 F. Supp. 1393 (E.D. Pa. 1988).

dentiary and legal presentations by all parties.⁴⁰⁸ After the district courts issue revised decisions, they too may be appealed.

While rules of *res judicata* or the law of the case would ordinarily prevent parties from relitigating the same issues, such rules provide little protection when the governing legal principles are constantly changing. If the district court makes a finding regarding the contingency multiplier which is reversed and remanded for reconsideration under a new standard, the defendant is well within her rights to file an appeal from the second contingency finding as well.⁴⁰⁹ In short, the complex and rapidly changing nature of this area of law promotes a cycle of seemingly never-ending decisions, appeals, and remands.

Defendants, moreover, have strong economic incentives to prolong the fee litigation for as long as possible. Besides generally preferring to pay later rather than earlier, defendants are further encouraged to delay payment because courts, in compensating plaintiffs for delay, use interest rates lower than those defendants can obtain on their own investments.⁴¹⁰ Even if prime interest rates are used to calculate the delay enhancement, it is likely that defendants can earn a higher rate of return.

Defendants may be particularly tempted to employ delay tactics where their opponent is a small firm which may be forced into an unfavorable settlement by economic hardship. Frequently, these firms have to borrow significant sums of money at high rates of interest simply to remain afloat while the fee battle is being fought.⁴¹¹ Insomuch as interim fees are not routinely available to plaintiffs' counsel, the threat of delay may force them to settle early for a fee which is lower than what they might have received had they been able to wait for the court's final ruling. As a consequence, while delay multipliers are intended to benefit plaintiffs' counsel, in reality they rarely provide adequate compensation.

In sum, the inadequacy of delay multipliers, combined with the courts' inappropriate emphasis on the lodestar and the failure to award sufficient contingency multipliers, essentially guarantee that plaintiffs' attorneys will lose money in handling civil rights cases, at least when compared to their counterparts in other complex federal litigation. Civil rights litigation has reached a point where plaintiffs' counsel often are forced to view a case in terms of potential losses rather than potential earnings.

408. See, e.g., *Black Grievance Comm.*, 802 F.2d at 648, *vacated*, 483 U.S. 1015 (1987) (remanded for new presentations in light of Court's *Delaware Valley II* decision while defendant was taking its appeal).

409. This is what happened in the *Blum v. Witco Chemical Corp.* litigation. See *Witco II*, 888 F.2d 975 (3d Cir. 1989).

410. See *supra* text accompanying notes 279-82.

411. See *Missouri v. Jenkins*, 109 S. Ct. 2463, 2469 n.6 (1989) (plaintiff's attorney compelled to borrow \$633,000 and pay more than \$113,000 in interest to meet operating expenses, pending outcome of major school desegregation case); see also Amicus Brief, *supra* note 5 (discussing financial problems of twelve small civil rights firms).

III.

STEPS PLAINTIFFS'-SIDE CIVIL RIGHTS ATTORNEYS CAN TAKE
TO PROTECT THEIR FEE

The preceding sections of this Article discuss the various possible attacks on statutorily guaranteed fees and costs of prevailing plaintiffs' attorneys in civil rights cases. Generally, the biggest concerns of these attorneys are the following: (1) they may be forced into a settlement which requires them to forego their entire fee;⁴¹² (2) they may be awarded fees, in a settlement or court award, which do not reflect their full hourly rate;⁴¹³ (3) they may be awarded fees, in a settlement or court award, which do not reflect all of the hours expended on the litigation;⁴¹⁴ (4) they may be denied adequate compensation for the delay in payment or risk of non-payment they have endured;⁴¹⁵ and (5) they may be forced to absorb the cost of expert witnesses.⁴¹⁶

While the monetary implications of these eventualities may differ substantially from case to case, any one of them could have a devastating effect on counsel's financial situation. This is particularly true when, as is often the case, the civil rights attorney is a member of a small firm. Even a relatively slight impingement on the expected fee may have a very significant impact on the firm's finances and future.⁴¹⁷ This Section discusses how civil rights attorneys can try to avoid the array of economic pitfalls and how, in turn, these efforts could potentially affect their clients.

A. *Self-Help*1. *Fee Agreement*

The plaintiffs' civil rights attorney's most important tool in protecting her fee is the fee agreement itself. In rosier times, some attorneys, particularly those working for legal services organizations or those handling class actions, did not require civil rights plaintiffs to pay legal fees at all. Instead, such attorneys relied exclusively on court-awarded fees for their compensation, while allowing plaintiffs to retain the entire amount awarded on the merits of the lawsuit.⁴¹⁸ Other attorneys simply signed up civil rights plaintiffs using the same sort of contingent fee agreement typically used by attorneys representing personal injury victims.⁴¹⁹ These agreements generally require the

412. See *supra* text accompanying notes 231-54.

413. See *supra* text accompanying notes 95-114.

414. See *supra* text accompanying notes 18-94.

415. See *supra* text accompanying notes 271-85 & 386-411.

416. See *supra* text accompanying notes 255-69.

417. See generally Amicus Brief, *supra* note 5 (discussing financial problems of small plaintiffs'-side civil rights law firms).

418. The legal services attorneys in *Evans v. Jeff D.*, 475 U.S. 717 (1986), took this approach. See *supra* text accompanying notes 231-44.

419. See Amicus Brief, *supra* note 5, at 15 (discussing contingent fee agreements used by twelve small civil rights firms); see also Affidavit of Michael P. Malakoff, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198 (Malakoff ceased representing civil rights plaintiffs on contingent fee basis for financial reasons).

plaintiff to pay her attorney a fixed percentage of any recovery in return for representation. The pure contingent fee agreement is highly desirable to potential clients who could not otherwise afford to retain an attorney.

It is no longer feasible, however, for plaintiffs'-side civil rights attorneys to rely solely on court-awarded fees or pure contingent fee agreements for their compensation. While such arrangements may be viable for attorneys who take occasional civil rights cases on a pro bono basis, they do not adequately protect the economic interests of attorneys seeking to practice exclusively civil rights law. For example, an attorney who takes a case relying solely on court-awarded fees has little or no recourse when the defendant makes an offer of judgment providing substantial relief to plaintiff but requiring plaintiffs' counsel to waive her entire fee.⁴²⁰ The pure contingent fee agreement also leaves an attorney vulnerable to a forced fee waiver where, in a settlement, she obtains substantial injunctive relief for her client but little or no monetary relief.⁴²¹ If a defendant conditions an offer of full non-monetary relief and a limited amount of compensatory relief on plaintiffs' counsel's waiver of her claim to fees, plaintiffs' counsel will only be entitled to a portion of the limited monetary relief obtained. That sum may be insufficient to compensate plaintiffs' counsel for the time she has expended on the litigation.

Attorneys who seek to make a living practicing plaintiffs'-side civil rights law have several options. First, they may limit their clientele to those who can afford to pay full hourly rates on a regularly billed basis, as would the typical defense client.⁴²² While this approach will guarantee attorneys higher income in each case, it will also assure them a smaller number of clients. Civil rights claims are very expensive to litigate. They are generally staunchly opposed by large law firms retained by defendants and are frequently paper-intensive and factually complex. One attorney, who handles both plaintiff and defense civil rights cases, estimated that his typical plaintiffs'-side case costs \$200,000 in attorney's fees in addition to advances for costs.⁴²³ Even a fairly small case, requiring an expenditure of just 300 hours of preparation and trial time, would cost \$45,000 at the relatively modest hourly rate of \$150 per hour.

Obviously most civil rights plaintiffs cannot afford fees of this magnitude. Frequently such plaintiffs are unemployed as a result of their employer's alleged discrimination. Even those plaintiffs who are still working generally do not earn enough to pay \$45,000 in legal fees over the course of a year or two.

420. See *Marek v. Chesny*, 473 U.S. 1 (1985), discussed *supra* text accompanying notes 215-30.

421. See *supra* text accompanying notes 237-54.

422. An attorney who took a case on such a basis would, presumably, agree to refund the client for any court-awarded fees. Cf. *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990) (expressly permitting attorneys to charge their clients fees in excess of those awarded by the court). See *supra* text accompanying notes 311-16.

423. Affidavit of Alan M. Lerner, Esq., in *Black Grievance Committee Affidavits*, *supra* note 198.

Only an occasional wealthy executive, most probably bringing an age discrimination case, will be able to afford these fees.

A second option available to plaintiffs'-side attorneys is a partially contingent fee agreement. Such an agreement could, for example, require clients to pay for one-third of the attorney's full fee on a regularly billed basis, while the remaining two-thirds is taken on a contingent basis. Win or lose, the attorney is guaranteed one-third of her full fee. If the attorney wins or settles the case, the client owes the remaining two-thirds of the fee.⁴²⁴ The one-third payment assures at least a minimum cash flow as the case progresses and also protects attorneys from wholly unreasonable clients. While clients who make no regular fee payments often refuse to settle for anything less than 100% of their loss, clients who make regular payments of hundreds or thousands of dollars tend to approach settlement talks far more eagerly.

The contingent two-thirds of the agreement largely protects the attorney from the risk of losing her entire fee to an offer of judgment or fee waiver. The client, knowing that she will be personally liable for the remaining two-thirds of the fee, has no incentive to accept a settlement or offer of judgment which provides substantial relief to the plaintiff but no fee for the attorney. A client who owes the attorney nothing more than the right to file a fee petition or a percentage of the final recovery would be tempted to accept an offer of reinstatement, even with little or no back pay, whereas the client who will owe the attorney her full hourly rate cannot afford to accept such an offer.⁴²⁵ Essentially, the partially contingent agreement ensures that the financial interests of client and attorney will mesh more closely than those situations where the attorney is entitled to only a percentage of the final recovery or where there is no fee agreement at all.

Plaintiffs' counsel can use the fee agreement to protect her fee in other respects as well. First, she should have the client authorize her to petition for court-awarded fees and, if necessary, to appeal the court's fee award. While the agreement need not compel the client to pay for the fee appeals, it must, at a minimum, permit the attorney to file fee petitions and appeals at her own expense. These agreements are necessary because courts have held that although it is the attorney's fee which is at stake, the client must authorize the fee petition and appeal.⁴²⁶ Therefore, even though the client presumably has

424. The attorney can vary these figures to suit her needs as well as those of her client. One variation could hold the client ultimately liable for the greater of the full fee or one-third of the total amount awarded in the case. This would provide the attorney with an effective contingency bonus for obtaining a large settlement or verdict within a relatively short period of time. The bonus would help offset the attorney's losses on other cases.

425. Where the plaintiff is essentially judgment-proof, the attorney may still lose out when she has obtained a reinstatement offer for her client because the client may accept the offer and then refuse to pay the remaining two-thirds of the fees. In practice, attorneys and clients often renegotiate the fee in the context of a settlement offer.

426. *Soliman v. Ebasco Servs. Inc.*, 822 F.2d 320 (2d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988).

no interest in denying her attorney the right to seek fees, it is advisable for the attorney to guarantee this right in the fee agreement.

Second, the attorney can use the fee agreement to bolster her claim for court-awarded fees, since courts may look to the nature of such agreements in determining fee awards. The agreement should clearly set forth the attorney's full hourly rates, even where the client is not required to pay these rates on an ongoing basis. The agreement can also be used to emphasize the contingent nature of the case by explicitly stating that the client, unable to afford full hourly billing, has agreed to pay the attorney a certain portion of the final award in return for taking the case on a contingent or partially contingent basis.

2. Complete and Detailed Records

The second step plaintiffs'-side attorneys should take to protect their fee is to keep complete and detailed records of all work they perform on the case. It is now well established that a plaintiff's attorney will be denied compensation for hours which are inadequately documented.⁴²⁷ To avoid this potential problem the attorney should keep time records contemporaneously and should avoid generalized descriptions such as "worked on case" or "reviewed file." Instead, the attorney should, to the greatest extent possible, specify what motion she was working on, what deposition she was preparing for, or what issue she was researching.⁴²⁸ The attorney should also record her time in terms of fragments of hours rather than whole hours or days. Courts are familiar with the fact that attorneys customarily measure their time in six, ten, or fifteen minute intervals, and are not likely to appreciate time records which do not give similar detail.

In submitting a fee petition, the attorney should provide the court with a detailed itemization of time spent on the case, rather than just summaries prepared from these records. One court held that an attorney should be denied full fee compensation for failing to submit the detailed records to the court, even where the attorney stated that she used the records to prepare the summaries, that they were available in her office, and that the only reason the records were not produced was because opposing counsel failed to request them.⁴²⁹

427. See, e.g., *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1176 (6th Cir. 1990).

428. The attorney who keeps such detailed records bears the risk that she may be providing defense counsel or the court with more ammunition with which to challenge the amount of time she spent on any particular aspect of the case. However, it is better to take this risk than to have the court entirely deny compensation for many hours of work because that time was insufficiently documented. At least if a lower court denies compensation for work on a particular motion, for example, the attorney has a greater chance of prevailing on appeal than if the court below refused to provide fees for vaguely described hours.

429. See, e.g., *Carrero v. New York City Hous. Auth.*, 685 F. Supp. 904 (S.D.N.Y. 1988), *aff'd*, 890 F.2d 569 (2d Cir. 1989).

3. *Simultaneous Suits to Protect Fees for Administrative Work*

The decisions in *Webb*⁴³⁰ and *Crest*⁴³¹ show that attorneys who perform administrative work pursuant to Section 1983, Title VI, or other statutes which do not specifically require the claimant to pursue administrative remedies before commencing an action in federal court cannot expect to receive court-awarded attorney's fees for time spent on administrative matters.⁴³² However, the dissent in *Crest* suggested that plaintiffs' attorneys may improve their likelihood of receiving court-awarded fees by filing an otherwise unnecessary lawsuit in federal court as expeditiously as possible.⁴³³ The dissent's theory is that where plaintiffs have filed such lawsuits, they will be in a stronger position to argue that the administrative action was "both useful and of a type ordinarily necessary to advance the civil rights litigation."⁴³⁴ Thus, even in cases where, for economic or other reasons, plaintiffs would find it more beneficial to proceed administratively than in court, they should nonetheless file a simultaneous suit in federal court to attempt to protect their fee entitlement. Instead of proceeding simultaneously in two fora, plaintiffs may seek to have the federal court action stayed or placed in suspense pending the outcome of the administrative litigation. Such a strategy would at least make it easier for sympathetic courts to justify awarding fees for the administrative work performed by plaintiffs' counsel.

4. *Separate Retainer Agreements with Expert Witnesses*

The Supreme Court's recent decision in *Crawford*⁴³⁵ has led increasing numbers of courts to conclude that plaintiffs may not recover expert witness fees in excess of \$30 per day.⁴³⁶ However, the First Circuit has offered a means by which plaintiffs'-side civil rights attorneys may limit such pernicious rulings.⁴³⁷ Specifically, *Denny* suggested that the \$30 per day limit might apply only to in-court testimonial time and preparation but not to the general assistance provided by the expert to the plaintiff in preparing her case.⁴³⁸ Arguably, the First Circuit is suggesting that a plaintiff should not be denied compensation simply because her counsel assigned an expert to perform tasks which could be accomplished more efficiently by the expert than by counsel.

430. *Webb v. Board of Educ.*, 471 U.S. 234 (1985).

431. *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986).

432. *See supra* text accompanying notes 39-63.

433. 479 U.S. at 23-26 (Brennan, J., dissenting).

434. *Id.* at 25 (quoting *Webb*, 471 U.S. at 243); *see supra* text accompanying notes 62-63.

435. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

436. *See supra* notes 263-65 and accompanying text. It should also be noted that the Supreme Court recently took certiorari in a case which raises the question of whether *Crawford* applies to civil rights cases brought under Section 1988. *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1294 (1990) (No. 89-994).

437. *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989) (dictum); *see supra* text accompanying notes 266-70.

438. 880 F.2d at 1472-73.

The Supreme Court's recent holding in *Missouri v. Jenkins*⁴³⁹ may also be used to bolster this argument. In *Jenkins*, the Court held that because successful civil rights plaintiffs are entitled to attorney's fees based on prevailing rates in the relevant legal community, they also can recover market-based fees for work done by paralegals under their direction.⁴⁴⁰ The Court explained that market rates for civil rights attorneys' time would not be fully compensatory if the attorneys were denied the opportunity to charge market rates for their paralegals' time.⁴⁴¹

Civil rights attorneys can argue that expert witness fees should be treated similarly. Though difficult, counsel should try to distinguish the time the expert spent preparing statistical analyses or exhibits, or advising on general trial strategy, and time spent preparing for or giving testimony. Presumably, where an expert is retained to testify, most of the expert's work will relate to her testimony. However, plaintiffs' counsel should strive to keep the work separate, making it clear in the retainer agreement with the expert that both types of work, testimonial and advisory, will be expected. When filing the fees and costs petition, plaintiffs' counsel should request compensation at different rates for the two types of services provided by the expert.

The risk-averse plaintiffs' counsel, however, should minimize expert witness fees, at least where the expert will be called upon to testify in court, until additional rulings have been made on this issue.⁴⁴² It is by no means certain that all courts will accept the distinction suggested by the First Circuit in *Denny*. Thus, those plaintiffs or attorneys who cannot afford to be saddled with a large, non-compensable expert witness bill should exercise caution, having attorneys or paralegals perform statistical and other analyses to the greatest extent possible.

B. *The Limits of Self-Help*

The self-help measures outlined above are limited in four major respects. First, even if plaintiff and her attorney adopt all of the suggested measures there is no guarantee that the prevailing plaintiff's attorney will ultimately receive reasonable compensation for her work. At most these measures can dam up a few holes in a very leaky dike. Courts can still exercise their discretion to reduce the attorney's compensable hours and hourly rate, deny fair compensation for contingency and delay, enforce harsh offers of judgment and fee waivers, and deny the plaintiff compensation for substantial and necessary expert witness costs.

Second, while some of the self-help measures outlined above may aid at-

439. 109 S. Ct. 2463 (1989).

440. *Id.* at 2470; see *supra* text accompanying notes 336-41.

441. 109 S. Ct. at 2471.

442. Where a plaintiff retains one expert solely for non-testimonial assistance, it will be easier to show that such expert's work was purely non-testimonial and thus compensable. Plaintiffs may therefore wish to consider hiring one expert to give testimony and another to assist with statistical analyses, preparation of exhibits, and trial strategy.

torneys in making a living, they will simultaneously make it more difficult for plaintiffs to secure representation, at least in the short-term.⁴⁴³ For example, many plaintiffs can afford to litigate their cases only on a purely contingent fee basis. Thus, where an attorney utilizes a partially contingent fee agreement, such as that suggested in this Article, she will be excluding those plaintiffs who cannot afford to pay the \$15,000 or more necessary to fund a portion of the ongoing costs of litigation. Until courts systematically begin to award contingency enhancements of at least 100% and to provide fair compensation for hours expended and delays incurred, plaintiffs with strong cases will find it extremely difficult, if not impossible, to secure competent representation.

Third, a partially contingent fee agreement, such as that suggested in this Article, may place a prevailing plaintiff in a position where she owes more to her attorney than she may potentially gain through litigation or settlement. Thus, attorneys should carefully screen their cases and discourage plaintiffs from bringing suit if it is clear that the proceeds of the case will not sufficiently cover plaintiffs' legal fees.

Fourth, some of the other self-help measures suggested in this Article may tend to make civil rights litigation less efficient and thus more costly to society overall. Specifically, filing simultaneous administrative and federal court actions serves no societal interests. Rather, such dual filings are simply a waste of attorneys' time and judicial resources. Similarly, from an economic standpoint, defendants' and society's interests would be best served by having statistical and other analyses performed in the most efficient manner, that is, by expert witnesses rather than attorneys or paralegals. Nonetheless, in view of the likely non-compensability of many expert witness fees, plaintiffs would be well advised to limit their expenditure on experts. Consequently, defendants and judges should expect that plaintiffs' counsel's time sheets will contain numerous entries for statistical and other work which formerly would have been performed by an expert.

In sum, while plaintiffs' counsel should adopt the self-help measures set forth in this Article, such measures are no panacea. Rather, we must look to the courts, and ultimately to Congress, to restore the original purpose of the civil rights fee-shifting legislation: the guarantee of reasonable fees and costs to prevailing civil rights plaintiffs.

443. In the long-term, the adoption of such self-help measures may, to a limited degree, assist some plaintiffs in securing representation. Many attorneys left the field when they realized they could no longer economically survive on a contingent fee basis. If the use of a partially contingent fee agreement permits some of these attorneys to return to the field, at least on an occasional basis, some plaintiffs may, in the long-term, find it easier to obtain competent representation.

IV.

THE NEED FOR CONGRESSIONAL ACTION

A. *Why Congressional Action is Needed*

As discussed above, the Supreme Court's interpretations of the laws granting reasonable attorney's fees and costs to prevailing civil rights plaintiffs have made it difficult, if not impossible, for an attorney to specialize in plaintiffs'-side civil rights law. The decisions handed down in the last seven years illustrate that while an attorney may occasionally earn a profit on a civil rights matter, she will very likely suffer large economic losses on most civil rights cases.⁴⁴⁴ This harsh economic reality has driven many attorneys out of the practice of plaintiffs'-side civil rights law, and has discouraged new attorneys from entering the field.⁴⁴⁵ Moreover, those attorneys who continue to specialize in plaintiffs'-side civil rights law have often, by necessity, changed their fee agreements to exclude potential plaintiffs who can only afford to retain an attorney on a purely contingent basis.⁴⁴⁶

In short, the Supreme Court's seven-year attack on the civil rights fee-shifting legislation has effectively acted as a repeal of that legislation. Whereas Congress intended that the fee-shifting provisions would ensure the availability of competent attorneys to take on civil rights cases,⁴⁴⁷ the Supreme Court's decisions have practically guaranteed the opposite result.

It is clear that unless Congress steps in to restore the legislation to what its drafters originally envisioned, many victims of discrimination will be deprived of competent representation to fight for their rights. While the extent of the devastation caused by the Supreme Court's various decisions cannot yet fully be assessed, it is already evident that the Supreme Court and many lower courts are willing to devalue the work of those attorneys who strive to vindicate their clients' civil rights. Only Congress can remedy the serious damage caused by the Supreme Court's fee decisions.⁴⁴⁸

B. *What Congressional Action is Needed*

Congress does not face an easy task. Whereas the legislation it originally passed was extremely simple, the Court has developed a highly complex body of law governing fee litigation. Congress must address the Supreme Court's fee decisions by passing new statutory clarifications or amendments.

444. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983), discussed *supra* text accompanying notes 21-38; *Delaware Valley II*, 483 U.S. 711 (1987), discussed *supra* text accompanying notes 135-73.

445. See *supra* note 7.

446. See *supra* text accompanying notes 419 & 421.

447. See *supra* note 1 and text accompanying notes 158-60.

448. Congress should also defeat all proposed legislation which would further limit the fees available to prevailing plaintiffs. See *Larson, supra* note 1 (discussing and criticizing anti-fee legislation introduced before the 99th Congress).

Although the Court will eventually be called upon to interpret such statutory additions, it will have to consider expressed Congressional intent in doing so.

1. *Comparable Rates*

As a first step, Congress should adopt new fee legislation reiterating that civil rights attorneys are entitled to compensation at the same rate that attorneys of comparable skill and experience receive for handling complex federal litigation in areas such as antitrust or securities law. Despite Congress' explicitness on this issue in the legislative history surrounding the passage of Section 1988,⁴⁴⁹ the Supreme Court often pays nothing more than lip service to this mandate.⁴⁵⁰ Instead, the Court is gradually embracing the idea that civil rights attorneys deserve only the minimum amount necessary to attract any attorney to the field.⁴⁵¹ At times, the Court has expressly rejected the idea that plaintiffs' attorneys should be paid as much as their defense counterparts.⁴⁵² It is crucial that Congress reiterate its original message to ensure that civil rights plaintiffs can obtain highly competent counsel. While all attorneys have an ethical obligation to give their best effort to any case they undertake, not all attorneys are equally knowledgeable, talented, or experienced. Civil rights plaintiffs should not be relegated to representation by only those attorneys who take on an occasional civil rights matter to fill out their caseload.

2. *Reasonable Compensation for Contingency and Delay*

Next, Congress should specify that the attorney's fee must include reasonable compensation for any contingency and delay in payment and should recommend basing the delay factor on a specific interest rate. While the Supreme Court has reluctantly recognized that prevailing plaintiffs are entitled to compensation for both contingency⁴⁵³ and delay,⁴⁵⁴ the Court and lower federal courts have applied grossly insufficient contingency and delay multipliers to plaintiffs' fee awards. Significant enhancements must be awarded as a matter of course, rather than as an occasional gift or bonus to the lucky prevailing plaintiff.

From a monetary perspective, contingency and delay enhancements are two of the most important components of a reasonable attorney's fee award. Some considering the contingency issue have concluded that attorneys handling civil rights cases on a purely contingent basis require a contingency en-

449. See, e.g., *supra* text accompanying note 160.

450. See *supra* text accompanying notes 149-56.

451. See *supra* text accompanying notes 365-67.

452. *Delaware Valley I*, 478 U.S. 546, 565-66 (1986) (fee-shifting statutes are not designed to replicate fees paid to private attorneys).

453. *Delaware Valley II*, 483 U.S. 711 (1987); see *supra* text accompanying notes 135-54 & 365-67.

454. *Missouri v. Jenkins*, 109 S. Ct. 2463, 2479 (1989); see *supra* text accompanying notes 271-75.

hancement of between 100% and 300% to provide adequate compensation.⁴⁵⁵ The most straightforward approach Congress could take to the contingency issue would be to require that 100% contingency enhancement be awarded, absent extenuating circumstances.⁴⁵⁶ Where the client and attorney entered into an agreement which was only partially contingent, the 100% enhancement could be applied just to the contingent portion of the fee.⁴⁵⁷ Congress should, at a minimum, specify that contingency enhancements are presumptively appropriate and should not be limited to a particular percentage of the lodestar. Such a declaration would counteract the plurality's dicta in *Delaware Valley II* which stated that contingency multipliers should rarely be awarded and should rarely exceed 33% of the total lodestar.⁴⁵⁸

Delay enhancements also play a significant monetary role. Where litigation has been going on over a course of several years, plaintiffs' attorneys may be entitled to a delay enhancement of 100% or more.⁴⁵⁹ Congress should determine the specific interest rate to apply in calculating delay enhancement. There is no reason to grant the courts unbridled discretion in making this calculation. Allowing such discretion simply provides the courts with the option of compensating plaintiffs' counsel inadequately for lost use of fees. Congress should mandate a specific interest rate, such as the Treasury Bill rates used for post-judgment awards,⁴⁶⁰ and require that all delay enhancement calculations use this rate.

3. *Award of Fees and Costs Reasonably Related to Any Issue on Which Plaintiff Prevailed*

As discussed above, many courts have applied the Supreme Court's decision in *Hensley v. Eckerhart*⁴⁶¹ to dramatically reduce the lodestar to which prevailing plaintiffs' attorneys are entitled. Besides combing counsel's time sheets to eliminate hours deemed wasteful or inadequately documented, courts also substantially reduce compensable hours on the ground that plaintiff failed to prevail on all issues or claims in the complaint.⁴⁶² This simplistic analysis fails to recognize the extent to which counsel's work involves a variety of interrelated issues. In addition, where the plaintiff was not 100% successful, many courts fail to consider whether the relief obtained by the plaintiff never-

455. See *Black Grievance Committee Affidavits*, *supra* note 198; see also *supra* notes 200-05 and accompanying text.

456. Professor Leubsdorf advocated this approach on the grounds of both simplicity and policy. Leubsdorf, *supra* note 4, at 512. Such an approach would encourage attorneys to accept those cases in which they thought they had at least a 50% likelihood of success.

457. See *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990) (100% contingency appropriately applied to contingent portion of fee, even where attorney earned a part of his fee on a non-contingent basis).

458. *Delaware Valley II*, 483 U.S. 711, 730 (1987).

459. See *supra* text accompanying notes 271-79.

460. See 28 U.S.C. § 1961 (1982).

461. 461 U.S. 424 (1983).

462. See *supra* text accompanying notes 64-75.

theless justified the number of hours expended by counsel on the case.⁴⁶³

Of course, no court should award counsel compensation for truly wasteful hours. However, the *Hensley* analysis allows a court to exercise too much discretion in cutting the prevailing counsel's lodestar, simply because the court believes the case could have been tried more efficiently. Congress should override the *Hensley* decision to a limited extent by requiring that plaintiffs' counsel receive compensation for all hours and costs reasonably related to any issue on which plaintiffs prevail. Like *Hensley* itself, such a rule would not compensate counsel for work performed on wholly unsuccessful and unrelated issues.⁴⁶⁴ It would, however, clearly establish that *Hensley* should not be used arbitrarily to slash large portions of the time expended by plaintiffs' counsel from her lodestar.

4. *Compensation for Work Performed to Secure Administrative Relief*

Congress should effectively reverse the Supreme Court's opinions in *Webb v. Board of Education*⁴⁶⁵ and *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*,⁴⁶⁶ which deny compensation for time expended to enforce statutes such as Title VI and Section 1988 through administrative actions. These opinions make no sense from a policy perspective since it may be more efficient for claimants to seek relief initially through the administrative process rather than through the courts.⁴⁶⁷ The *Webb* and *Crest* decisions will result in a greater logjam in the federal courts due to unnecessary suits. Thus, Congress should provide that plaintiffs who obtain relief through the administrative process are also entitled to attorney's fees.

5. *Prohibition of Forced Fee Waivers in Class Actions*

Attorneys who handle class actions are far more vulnerable to forced fee waivers than attorneys who represent individual plaintiffs.⁴⁶⁸ Whereas the latter can protect their financial interests by negotiating fee agreements with their

463. That is, courts should ask themselves not the mechanical question of whether plaintiffs prevailed on all or most of the claims contained in their complaint, but rather whether the overall results achieved in the litigation justified the number of hours expended by plaintiffs' counsel. See generally *Hensley*, 461 U.S. at 436-37 (*Hensley* reduction cannot be governed by precise rule or formula); *Quesada v. Thomason*, 850 F.2d 537, 539-40 (9th Cir. 1988) (failure to obtain all relief requested does not justify fee reduction where overall relief obtained justifies fee); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 919 (3d Cir. 1985) (proper question not whether plaintiff prevailed as to specific hours but rather whether final fee awarded is reasonable in light of level of success).

464. Arguably, plaintiffs' counsel should be entitled to compensation for all hours spent in good faith on the litigation, regardless of the interrelatedness of the plaintiffs' winning and losing theories. This author does not share this view. Such a position goes too far because it allows plaintiffs to recover fees for work performed on totally unsuccessful and unrelated issues.

465. 471 U.S. 234 (1985).

466. 479 U.S. 6 (1986).

467. See *supra* note 63 and text accompanying notes 430-34.

468. See *Evans v. Jeff D.*, 475 U.S. 717 (1986); see also *supra* text accompanying notes 231-

clients, attorneys who handle class actions generally do not have this opportunity. Frequently they do not know the identities of all their clients, and therefore cannot obtain their signatures on a fee agreement, as is required by Section 1988.⁴⁶⁹ Without such an agreement, counsel is vulnerable to the threat of forced fee waivers, whereby she must sacrifice her own fee in the interests of the class.

Congress should protect the financial interests of class action attorneys by prohibiting such forced waivers in the class action context so that attorneys can continue to take on class actions without having to do so only on a pro bono basis.

6. *Full Recovery of Expert Witness Fees*

The Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,⁴⁷⁰ as applied by many lower courts, denies prevailing plaintiffs under Section 1988 or Title VII compensation for fees paid to statistical and other experts.⁴⁷¹ Clearly *Crawford* does not advance, and indeed may frustrate, the purposes of the civil rights fee-shifting legislation. Rather than relying on more knowledgeable and efficient outside experts, plaintiffs' counsel will now have to perform their own "expert" work. Requests for attorney's fees will, in turn, be higher, reflecting the additional hours expended by counsel.⁴⁷² Ultimately, the defendant may have to pay more than if the work had been performed by an expert witness. Congress should rectify this situation by declaring that the \$30 per day limit of 28 U.S.C. §§ 1981 and 1920 was not intended to limit the reasonable fees and costs due prevailing civil rights plaintiffs.

7. *Protection of Fees Where Settlement Offer Rejected*

As discussed above, the Court's interpretation in *Marek v. Chesny*⁴⁷³ of Rule 68 of the Federal Rules of Civil Procedure forces civil rights plaintiffs and their attorneys to make an untenable choice between accepting an inadequate offer of judgment and risking the loss of court-awarded attorney's fees.⁴⁷⁴ Under current law, plaintiffs who reject an offer but then receive a lesser judgment at trial — because they incorrectly assessed either the strength of their case or the dollar value of damages or injunctive relief sought in the case — are denied recovery of their fees. Congress should undercut the *Marek* decision by simply clarifying that court-awarded attorney's fees are not

469. See *supra* text accompanying notes 253-54.

470. 482 U.S. 437 (1987).

471. See *supra* notes 262-69 and accompanying text. The Supreme Court recently granted certiorari in a case which presents the precise issue of whether expert fees sought pursuant to Section 1988 are capped by the \$30 per day limit. *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11 (3d Cir. 1989), cert. granted, 110 S. Ct. 1294 (1990) (No. 89-994).

472. See *supra* text accompanying note 442.

473. 473 U.S. 1 (1985).

474. See *supra* text accompanying notes 215-30.

“costs” within the meaning of Rule 68 and therefore not an expense which the plaintiff must bear.

8. *Recovery of Fees Against Third Party Intervenors*

Prior to the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*,⁴⁷⁵ courts routinely awarded plaintiffs fees against third parties who sought to undermine plaintiffs' victories in civil rights cases.⁴⁷⁶ *Zipes*, however, reversed this general rule, requiring plaintiffs to absorb the cost of defending their settlements and judgments against intervenors unless the intervenor's action was “frivolous, unreasonable, or without foundation.”⁴⁷⁷

The *Zipes* rule is untenable because plaintiffs often are forced to spend thousands of dollars on attorney's fees and expert witness costs to protect the relief that they were previously awarded.⁴⁷⁸ Congress should enact legislation permitting plaintiffs to recover attorney's fees and costs against intervenors where, in the discretion of the district court, plaintiff has prevailed against the intervenor.⁴⁷⁹

C. *The Proposed Civil Rights Act of 1990*

In 1990, members of Congress, reacting to the Supreme Court's recent attack on civil rights, introduced legislation to amend the Civil Rights Act of 1964 in order to counteract some of the Court's most egregious decisions and to expand certain rights available to civil rights plaintiffs.⁴⁸⁰ Recognizing the

475. 109 S. Ct. 2732 (1989).

476. *E.g.*, *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988) (awarding fees to prevailing plaintiffs who successfully defended appeals by intervening defendants); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984) (awarding fees to prevailing plaintiffs against intervenors).

477. 109 S. Ct. at 2736.

478. *Zipes*, in which plaintiffs spent nearly three years and close to \$200,000 defending their settlement against attack by the intervening union, is no isolated case. *See, e.g.*, *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 506-15 (1986) (plaintiffs spent almost five years defending Title VII consent judgment against collateral attack); *Geier v. Richardson*, 871 F.2d 1310, 1311-12 (6th Cir. 1989) (federal government intervened to challenge consent decree reached after more than 15 years of litigation); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1272 (N.D. Ohio 1984) (intervenors' actions forced plaintiffs to file numerous additional documents); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't*, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982) (union intervenor sought unilaterally to dissolve temporary restraining order granted to plaintiffs).

479. Justices Marshall and Brennan, dissenting in *Zipes*, make a well-reasoned attack on the majority's conclusion that fees may not generally be awarded against intervenors. 109 S. Ct. at 2741-46.

480. The bill, known as the Civil Rights Act of 1990, was introduced by Senator Kennedy in the Senate. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990). A virtually identical bill was introduced in the House of Representatives by Representative Hawkins. H.R. 4000, 101st Cong., 2d Sess. (1990). Except where differences are pertinent, these bills are discussed together as the proposed Civil Rights Act of 1990. All references cite to the proposed legislation as originally put forward by the authors. Both houses of Congress passed the legislation; President Bush, however, vetoed the Act, and the Senate sustained his veto by

importance of fee legislation, the proponents of the Civil Rights Act of 1990 have included several provisions to allow for the recovery of reasonable attorney's fees and costs by prevailing civil rights plaintiffs. Although the bill is a step in the right direction, it would afford only modest gains on the fees front. One of the bill's most serious limitations lies in its scope of application. Specifically, the proposed amendments affect only Title VII cases, and not suits brought under other civil rights statutes.

1. *The Act's Fee Provisions*

The Civil Rights Act of 1990, if enacted, would amend Title VII to clarify that expert witness fees and other litigation expenses are available to prevailing civil rights plaintiffs.⁴⁸¹ The proposed amendment is designed to rectify problems created by the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,⁴⁸² which limited recovery of expert witness costs to just \$30 per day.⁴⁸³

The proposed statute also seeks to prevent civil rights plaintiffs from being forced to waive their right to attorney's fees by proposing the following amendment to Title VII:

A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.⁴⁸⁴

This provision is an important step towards protecting the civil rights attorney's financial interest, although defendants would still retain the power to force fee waivers in non-Title VII civil rights cases.

The proposed Civil Rights Act of 1990 also seeks to prevent civil rights plaintiffs and their attorneys from having to defend judgments or settlements against collateral attack without hope of compensation.⁴⁸⁵ The proposed amendment is intended to reverse, at least in part, the Supreme Court's decision in *Zipes* which held that plaintiffs could not recover approximately

one vote. Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3.

481. H.R. 4000, *supra* note 480, § 9(2); S. 2104, *supra* note 480, § 9(2).

482. 482 U.S. 437 (1987).

483. See *supra* text accompanying notes 258-65.

484. H.R. 4000, *supra* note 480, § 9(4); S. 2104, *supra* note 480, § 9(4). This provision amends § 706(k) of Title VII.

485. The proposed statute would amend Title VII by adding the following language to § 706(k):

In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the [Equal Employment Opportunity] Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert witness fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.

H.R. 4000, *supra* note 480, § 9(4); S. 2104, *supra* note 480, § 9(4).

\$200,000 that they had spent defending the settlement of a civil rights class action against attack by a union intervenor.⁴⁸⁶ Specifically, the proposed legislation adopts the position urged by Justice Blackmun in his concurrence that the fees should be borne by the original defendant, rather than by the intervenor.⁴⁸⁷

In addition to its limited application beyond Title VII, Congress' suggested solution to the *Zipes* problem has several flaws. First, by requiring the defendant, rather than the unsuccessful intervenor, to pay the costs of future litigation, defendants may be discouraged from entering into settlements in the first place. Because settling defendants typically seek to put the entire litigation behind them once and for all, they will have less incentive to settle if they know that they may still be held liable for extensive litigation fees caused by possible intervenor challenges. In addition, the proposed amendment does not provide plaintiffs with a means of recovering fees against intervenors in the original action, only allowing recovery against intervenors who attack a prior settlement or decree. Nevertheless, the legislation would certainly take large strides toward eliminating the *Zipes* problem.

The proposed Civil Rights Act of 1990 would also protect Title VII plaintiffs and their attorneys from losing their fee award for rejecting an offer of judgment. *Marek v. Chesny*⁴⁸⁸ held that plaintiffs who reject offers of judgment and then go on to recover a lower amount through settlement or litigation cannot recover fees incurred subsequent to rejection of the offer. In contrast to the holding of the Court in *Marek* that attorney's fees are included in the definition of "costs" under Rule 68 of the Federal Rules of Civil Procedure, the proposed Civil Rights Act of 1990 explicitly excludes attorney's fees from the court's calculation of "costs."⁴⁸⁹

Finally, the proposed statute provides that the federal government may be held liable for interest on attorney's fee awards.⁴⁹⁰ This provision would reverse the Supreme Court's holding in *Library of Congress v. Shaw*⁴⁹¹ that Title VII did not waive the government's sovereign immunity from an award of interest on attorney's fees.⁴⁹² The provision is crucial because civil rights litigation often drags on for many years. Attorneys who litigate civil rights cases against the federal government are thus deprived of substantial sums of

486. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989), discussed *supra* at text accompanying notes 76-93.

487. 109 S. Ct. at 2740.

488. 473 U.S. 1 (1985), discussed *supra* at text accompanying notes 215-30.

489. The rewritten Title VII would provide "attorney's fees (including expert fees and other litigation and costs)" rather than "attorney's fee as part of the costs." H.R. 4000, *supra* note 480, §§ 9(2)-(3); S. 2104, *supra* note 480, §§ 9(2)-(3).

490. H.R. 4000, *supra* note 480, § 10(2) and S. 2104, *supra* note 480, § 10(2) state that "the same interest to compensate for delay in payment shall be available [from the federal government] as in cases involving non-public parties."

491. 478 U.S. 310 (1986).

492. *Id.* at 323.

interest on fee awards.⁴⁹³

2. Fee Issues Not Addressed by the Act

In sum, although the proposed Civil Rights Act of 1990 addresses some of the glaring problems stemming from recent attorney's fee decisions, it falls short of guaranteeing civil rights plaintiffs and their attorneys reasonable awards. The suggested revisions target only a few of the courts' methods of reducing prevailing plaintiffs' attorney's fees. Moreover, because of the limited scope of the pending legislation, which amends only Title VII, the Act offers no aid to plaintiffs suing under other civil rights statutes.

To ensure that prevailing civil rights plaintiffs recover a reasonable fee, Congress should also enact the type of legislation suggested earlier in this Article, including declarations that: (1) civil rights attorneys are entitled to be compensated at the same rate as equally skilled and experienced attorneys who handle other complex federal litigation;⁴⁹⁴ (2) prevailing plaintiffs are entitled to reasonable compensation for contingency and delay;⁴⁹⁵ (3) plaintiffs' civil rights attorneys are entitled to compensation for all fees and costs reasonably related to any issues on which plaintiff prevailed;⁴⁹⁶ and (4) plaintiffs' counsel are entitled to compensation for all work performed to secure relief covered by a fee statute, whether administratively or in court.⁴⁹⁷ These measures, entirely ignored by the proposed Civil Rights Act of 1990, could have a greater economic impact than those contained in that Act. They are thus essential to encourage attorneys to continue to handle civil rights litigation.

CONCLUSION

Although the Supreme Court continues to pay lip service to the concept that prevailing civil rights plaintiffs are entitled to reasonable attorney's fees and costs, the Court's actions belie its words. Rarely, if ever, do prevailing civil rights attorneys recover a fully compensatory fee. As a result, those who formerly specialized in civil rights law are now abandoning the practice in droves.⁴⁹⁸ Because specialists are not hatched overnight, it will take some time before another group of attorneys can become expert in the intricacies of civil rights law.

Congress must act quickly to prevent the Court's decisions from having such a devastating, long-term effect on civil rights lawyers and their clients. Only by enacting corrective legislation can Congress uphold the guiding principle behind fee-shifting statutes: assuring competent representation to plaintiffs seeking to vindicate their civil and constitutional rights.

493. See *supra* text accompanying notes 279-82.

494. See *supra* text accompanying notes 95-114.

495. See *supra* text accompanying notes 135-214 & 386-411.

496. See *supra* text accompanying notes 317-35.

497. See *supra* text accompanying notes 39-63.

498. See *supra* notes 7-9 and accompanying text.

