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# Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method

George B. Murr\*

*“Soon, my good man, we will know better. Think about something like the following. Is the pious loved by the gods because it is pious, or is it pious because it is loved?”*

Socrates, *The Euthyphro*<sup>1</sup>

## I. INTRODUCTION

Suppose I owned a property interest, a mineral interest in fee simple. Suppose I were to assign to you a working interest in that property as part of an oil and gas lease, and you agreed to be the oil and gas operator. The oil wells you had drilled on the property came in, and we struck it rich. Or suppose I owned a property interest, rights in a trademark or a patent. Suppose I were to assign to you a share of that interest with the agreement that you would provide capital to market the product. The product was a success and became immensely profitable.

The value of the mineral interest would be determined by the expected production from the interest in the mineral lease. Likewise, the value of the patent would be determined by the market for the product or innovation patented. The central component to the price negotiated for these interests would be the ability of the parties to apply their labor and obtain a return on the property. Moreover, the profitability of the mineral or patent interest rests upon its actual production. Therefore, parties would pay for the mineral or patent interest according to what they thought it would be worth, in essence creating a market for the interest. Driven by competition, this market automatically would factor the risk accompanying the investment into

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1. PLATO, *The Euthyphro*, in *FOUR TEXTS ON SOCRATES* 41, 52 (Thomas G. West and Grace Starry West trans., Cornell University Press 1984).

the price. But suppose that instead of receiving a return on these interests based upon their actual production, I told you that your recoverable royalty would be limited to a "reasonable royalty."

Now suppose I had a legal claim. I was injured, or my business was injured. Suppose I were to assign to you a share of that claim with the agreement that you would provide legal services and attempt to recover damages and attorney's fees. Both the quality of the legal work I could seek and the merits of the claim would be a function of the fee interest negotiated. The case was a winner and we were awarded a significant damage award. The court, however, would limit the attorney's fee award to a "reasonable fee." Further, the court's determination of the reasonableness of the fee would be based not upon the actual production, but upon the "rules of discipline." All of the sudden everything has changed. Or has it?

In virtually every American jurisdiction, the rule is that attorney's fees awarded must be "reasonable."<sup>2</sup> Questions remain, however. What are the guidelines used by the courts to determine reasonable attorney's fees? How are the guidelines to be applied?<sup>3</sup> Most important, are the guidelines used by the courts in fact reasonable?<sup>4</sup> This Article argues that reasonable attorney's fees are those that an attorney would be able to recover on the market for attorney's fees.

After over twenty years of attorney's fee litigation and the application of various and sundry elements of "reasonableness," the courts are only

2. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("It remains for the district court to determine what fee is 'reasonable'"); MODEL RULES OF PROFESSIONAL CONDUCT 1.5(a) (1998) ("A lawyer's fee shall be reasonable"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1983) ("[A] fee is clearly excessive when . . . the fee is in excess of a reasonable fee."). With very few exceptions, state jurisdictions have adopted this standard as set forth in either of the Model Codes. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 41:302-03 (American Bar Association 1995) (detailing the differences in the standard for attorney's fees between and among the states).

3. As one commentator noted:

Simply providing the lower courts with an exhaustive checklist of relevant factors, however, has done little to eliminate the confusion . . . . The fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all.

Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 286-87 (1977).

4. "Socrates: Because we agree that the pious is loved because it is pious, not that it is pious because it is loved, don't we?

Euthyphro: Yes."

PLATO, *supra* note 1, at 54.

now beginning to grapple with this principle of market value.<sup>5</sup> Courts in virtually every American jurisdiction evaluate the reasonableness of the attorney's fee claim using the elements for reasonable fees articulated by the United States Supreme Court in *Hensley v. Eckerhart*.<sup>6</sup> The elements proposed by the *Hensley* Court to determine the reasonableness of attorney's fees were "derive[d] directly from the American Bar Association Code of Professional Responsibility."<sup>7</sup> In addition, these same elements govern the reasonableness of attorney's fees in both the Model Code of Professional Responsibility and the newer Model Rules of Professional Conduct and have been adopted in virtually every state.<sup>8</sup> This Article suggests that the current lodestar

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5. See Berger, *supra* note 3, at 322-24.

6. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983).

7. *Id.*

8. Rule 1.5(a) of the Model Rules of Professional Conduct states:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT 1.5(a) (1998). Disciplinary Rule 2-106(B) of the Model Code of Professional Responsibility contains the same elements and provisions:

A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal search properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1983). With some exceptions, the majority of states have adopted the elements articulated in Model Rule 1.5(a) and Model Code

method may be adjusted to evaluate attorney work product better by including a contingent fee market valuation in the lodestar procedure. Such an adjustment would allow the federal courts to accommodate and enjoy the market valuation for attorney work product without having to drastically overhaul or scuttle the lodestar procedure.<sup>9</sup>

Part II examines the development of the lodestar procedure and highlights its administrative and evaluative problems.<sup>10</sup> Part III examines the suitability of using the market for claims to determine reasonable attorney's fees, comparing the market for claims to model markets for mineral interests and patents.<sup>11</sup> Part III further proposes that the administrative and evaluative problems of the lodestar can be addressed by simply altering the procedure to include an evaluation according to the market of claims. Moreover, Part III suggests that courts can tap the market for legal claims, already in place to some degree, in order to ascertain the reasonableness of attorney fees more easily and accurately.<sup>12</sup> Part IV concludes that courts may better analyze and evaluate attorney work product according to the existing market for claims by reformulating the lodestar.<sup>13</sup>

## II. THE LODESTAR METHOD FOR DETERMINING ATTORNEY'S FEES

### A. *The Lodestar Procedure for Valuation of Attorney's Fees in the Federal Courts*

The lodestar method of calculating attorney's fees is based upon a simple formula that multiplies time spent by a reasonable hourly rate.<sup>14</sup>

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DR 2-106. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 41:302-03 (American Bar Association 1995) (listing 39 states and the District of Columbia).

9. See Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 867-68 (1992).

10. See *infra* Part II (discussing the lodestar method for computing attorney's fees).

11. See *infra* Part III (discussing the suitability of the market for claims as a basis for determining reasonable attorneys' fees); see also Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 997 (1992) (using "an oil and gas lease and a long-term requirements contract between a buyer and a seller with interdependent operations to illustrate some basic features of many open term contracts").

12. See *infra* Part III (suggesting a reformulation of the lodestar method).

13. See *infra* Part IV (concluding that courts may better evaluate attorney work product by reformulating the lodestar method).

14. "The starting point or lodestar for setting fees is the time/rate calculation. The court will look to the amount of time spent and multiply that by the fee generally assessed for comparable work in the area." 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2675.1 (3d ed. 1998). In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court stated:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable

First devised by the Court of Appeals for the Third Circuit in 1973,<sup>15</sup> the lodestar method provides an estimate for fee awards based on a combination of hourly rates and hours expended, and then modifies this estimate with fee enhancements.<sup>16</sup> The lodestar method, thus, establishes a two step procedure for determining reasonable attorney's fees. First, the estimate is calculated using the basic hourly rate formula. Second, the estimate is modified, either upward or downward, depending on the circumstances of the case.<sup>17</sup> For example, the court may adjust the hourly rate "in light of prevailing community standards to the lawyer's 'experience, skill, and reputation.'"<sup>18</sup>

In 1983, the United States Supreme Court endorsed the two-step "lodestar" method of the fee calculation.<sup>19</sup> First, a court must determine the initial estimate by "multiplying the number of hours reasonably necessary to conduct the litigation by the reasonable hourly rate for the work of the attorney."<sup>20</sup> Second, the court must adjust this estimate to yield an equitable award.<sup>21</sup> Since its adoption by the Supreme Court in 1983, the lodestar analysis has been the subject of considerable scholarly criticism and judicial frustration.<sup>22</sup>

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hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and the fees claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

*Hensley*, 461 U.S. at 433.

15. See *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973).

16. See *Silver*, *supra* note 9, at 866-67.

17. See *Hensley*, 461 U.S. at 434; *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995).

18. *Silver*, *supra* note 9, at 867 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)).

19. See *Hensley*, 461 U.S. at 433-34. The Supreme Court relied on the decision of the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and the 12 factors articulated in *Johnson* and adopted by the House and Senate Reports that supported passage of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (West 2000). See *Hensley*, 461 U.S. at 429-30.

20. Note, *Risk Multipliers*, 101 HARV. L. REV. 290, 291 (1987).

21. One commentator noted:

In *Blum v. Stenson*, the Court mandated that fee awards be calculated 'according to prevailing market rates' in the relevant community and sharply reduced the availability of upward adjustments of the lodestar. The use of so-called 'risk' or 'contingency' enhancements—which add premiums to the lodestar on the basis of the attorney's assumption of the risk of nonpayment that exist in any contingent fee arrangement—has been particularly controversial.

*Id.* at 291 (citing *Blum v. Stenson*, 465 U.S. 886, 894 (1984)) (citations omitted).

22. See *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 721 (1987). One commentator acknowledges:

The only truly consistent thread that runs throughout federal court decisions on attor-

The lodestar method is an artificial valuation of the attorney's work product to calculate attorney's fees.<sup>23</sup> This method focuses almost exclusively on hourly rates for attorney's fees and the valuation of attorney work product. The lodestar considers a contingent fee agreement only secondarily and does not consider the market's effects upon contingency fees at all. Accordingly, the lodestar method reviews contingency fees retrospectively for their reasonableness and, thus, does not account for reasonableness at the inception of the agreement.<sup>24</sup> In order to complete the retrospective two-step lodestar analysis, a court must make three determinations:<sup>25</sup> first, the court must determine the nature and extent of the services supplied by the attorney; second, the court must value these services according to prevailing customs; and, third, the court must determine whether other factors warrant any adjustments to the calculated estimate.<sup>26</sup>

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neys' fees is their almost complete inconsistency. The resulting confused and conflicting state of the law has several unfortunate consequences. First, it inevitably results in unfairness to both attorneys and litigants. At present, the enormous variation in fee awards cannot be explained in terms of the differing facts and circumstances from case to case. Rather, it reflects the dissimilar manner in which various courts approach the job of fee setting. As a result, from court to court and from case to case, attorneys and litigants who are similarly situated are subjected to widely differing treatment.

Berger, *supra* note 3, at 292.

23. One commentator remarked:

Of course, to say that a percentage contingent fee must be 'reasonable' provides no guidance to lawyers and judges who must apply that standard in particular circumstances. DR 2-106(B) [of the Model Code of Professional Conduct] lists factors courts should consider in determining the reasonableness of a fee; one factor is '[w]hether the fee is fixed or contingent.'

Henry H. Drummonds, *The Law and Ethics of Percentage Contingent Fees in Oregon*, 72 OR. L. REV. 859, 868 (1993) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1983)).

24. *See id.* at 872-73.

25. The Court noted:

The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.* . . . . The Senate Report cites to *Johnson* as well and also refers to three District Court decisions that 'correctly applied' the 12 factors. One of the factors in *Johnson*, 'the amount involved and the results obtained,' indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded.

*Hensley v. Eckerhart*, 461 U.S. 424, 429-30 (1983) (citations omitted); *see also infra* Part II.A.3 (discussing the lodestar factors presented in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

26. *See Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995); *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1092 (5th Cir. 1982), *overruled by* *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *In re Terra-Drill Partnership Sec. Litig.*, 733 F. Supp. 1127, 1131 (S.D. Tex. 1990). "Determinations of hours and rates are questions of fact." *Louisiana Power & Light Co.*, 50 F.3d at 324.

### 1. The Nature and Extent of the Services Supplied by the Attorney

The first task in the lodestar analysis is to provide an estimate of the number of hours reasonably expended.<sup>27</sup> Because the lodestar method bases its calculation upon an hourly rate formula, even in contingency fee cases, attorneys must document time spent on a case with “contemporaneous billing records.”<sup>28</sup> The time records submitted are subject to scrutiny. In addition, the court must exclude hours that were not “reasonably expended” from the initial fee calculation.<sup>29</sup>

The standard lodestar formula further requires that the court disregard the contingency fee agreement negotiated by the attorney and client on the basis of the attorney’s expertise, the work product, and the merits of the case. The result is an artificially valued hourly fee based on a market that was neither consulted nor involved in the negotiation of the contingent fee. Courts applying the lodestar method thus exalt hourly market fees in their valuation of attorney work product but ignore the market that shapes contingency fees.

### 2. Calculating the Reasonable Rate

The second step in the lodestar analysis is to arrive at a reasonable hourly rate for the attorney requesting fees.<sup>30</sup> What is considered a reasonable rate may depend not only on the attorney’s actual fee, it may also be determined by what are presumed to be prevailing rates for other, similarly situated attorneys.<sup>31</sup> Accordingly, parties seeking attorney’s fees submit evidence regarding their own rates, as well as the general market rates for attorneys of comparable experience and expertise.<sup>32</sup> This two-tiered approach may require that a court expand the range of rates it considers, depending upon what is considered to be within market norms.<sup>33</sup> The court is required to consider both actual fees and what it presumes to be comparable market rates, although the

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27. See *Louisiana Power & Light Co.*, 50 F.3d at 324.

28. See *id.*

29. See *Hensley*, 461 U.S. at 434-35.

30. See *Drummonds*, *supra* note 23, at 873.

31. See *Louisiana Power & Light Co.*, 50 F.3d at 328.

32. See *id.*

33. See *id.*; *Islamic Ctr. v. City of Starkville*, 876 F.2d 465, 469 (5th Cir. 1989).

When an attorney’s customary billing rate is the rate at which the attorney requests the lodestar to be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When the requested rate of compensation exceeds the attorney’s usual charge but remains within the customary range in the community, the district court should consider whether the requested rate is reasonable.

*Islamic Ctr.*, 876 F.2d at 469 (footnote omitted).



particular circumstances surrounding the case impact the determination of what rates are reasonable. Further, rates charged must incorporate the opportunity cost of other cases and matters that a firm might have turned away in order to take on the litigation.<sup>34</sup> Although the court must consider market rates and comparable fees charged by similarly situated attorneys, the fee actually charged in the litigation is that entered into between the attorney and client.

The lodestar method instructs courts to determine the prevailing attorney hourly rates according to “the customary range in the community,” notwithstanding the fact that the negotiated fee agreement may not be related to the “community” at all. Although the court is required to determine the relevant market for attorney’s fees, the question that arises is how to determine the relevant market.<sup>35</sup> Except for calculating fees for local counsel, the local market where the courthouse is seated may have nothing to do with the circumstances under which the claim arose and where counsel was retained. Indeed, the legal market for some types of litigation expertise may not even exist in the locale where suit is filed.<sup>36</sup> For example, in *Blum v. Stenson*,<sup>37</sup> the Court considered an award of attorney’s fees to nonprofit counsel.<sup>38</sup> The *Blum* Court noted that no market exists for nonprofit counsel, and noted how perfunctory a market analysis becomes:

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34. See *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24 (D.C. Cir. 1984), quoted in *Louisiana Power & Light Co.*, 50 F.3d at 328; see also MODEL RULES OF PROFESSIONAL CONDUCT 1.5(a)(2) (1998) (“The factors to be considered in determining the reasonableness of a fee include the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(2) (1986) (American Bar Association Center for Professional Responsibility 1986, produced by the ABA Press) (“Factors to be considered as guides in determining the reasonableness of a fee include . . . The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.”).

35. See *Blum v. Stenson*, 465 U.S. 885, 895 n.11 (1984).

We recognize, of course, that determining an appropriate ‘market rate’ for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense, there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

*Id.*

36. Compare *Missouri v. Jenkins*, 491 U.S. 274 (1989) (construing local market rates for non-lawyer personnel), with *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292 (11th Cir. 1988) (construing the legal market for appropriate expertise notwithstanding location).

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

38. See *id.* at 888-89.

To inform and assist the court in the exercise of its discretion, the 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. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.<sup>39</sup>

Therefore, the lodestar analysis requires that courts create a market for legal services “deemed to be reasonable”<sup>40</sup> where in reality no such market exists. “The Court offers no reason why this market disappears only when the inquiry turns to [contingency] enhancement.”<sup>41</sup> Under the lodestar doctrine, the court is required to conjure an hourly market in a case prosecuted on the basis of a contingent fee agreement.<sup>42</sup> Nevertheless, the “relevant market” utilized by the courts to determine reasonable rates is not necessarily even related to the fee agreement reached between the attorney and client.

### 3. Adjustment Under Other Factors

After the lodestar estimate is calculated by multiplying the hourly rate by the hours reasonably expended, it must still be “adjusted to reflect other factors such as the contingent nature of the suit and the quality of representation.”<sup>43</sup> Adjustment of the lodestar is based upon numerous factors.<sup>44</sup> Not all courts, however, apply the adjustment factors in the same way.<sup>45</sup>

In *Johnson v. Georgia Highway Express, Inc.*,<sup>46</sup> the Fifth Circuit listed twelve factors that have been widely adopted, though not uniformly applied, in adjusting the lodestar calculation:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to

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39. *Id.* at 895 n.11.

40. *City of Burlington v. Dague*, 505 U.S. 557, 574 (1992) (Blackmun, J., dissenting).

41. *Id.* (Blackmun, J., dissenting).

42. *See id.* (Blackmun, J., dissenting).

43. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1093 (5th Cir. 1982), *overruled* by *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986).

44. *See Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 329 (5th Cir. 1995); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). “The district court also may consider other factors identified in [*Johnson*], though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983).

45. *See* 10 WRIGHT ET AL., *supra* note 14, § 1803.

46. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

acceptance of the case; (5) the customary fee [for similar work in the community]; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.<sup>47</sup>

In applying the *Johnson* factors, courts must make explicit and concise factual findings that outline not only those factors it considered in its cost adjustment, but also those factors that it discounted as of little significance.<sup>48</sup>

One factor under the *Johnson* test examines whether the fee is fixed or contingent.<sup>49</sup> Therefore, even under the lodestar method of calculating attorney's fees, a contingency fee arrangement may be relevant.<sup>50</sup> The Supreme Court, however, has clearly stated that only the fact of contingency is to be considered and not the contingency fee agreement itself.<sup>51</sup>

In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*,<sup>52</sup> the Supreme Court addressed the enhancement of the lodestar calculation based on contingent fees. Justice White, in the plurality opinion, expressed three guidelines for determining when contingent fees could be used to enhance the lodestar: (1) determination of whether the lawyer found an apparent risk of losing at the outset of the lawyer's involvement in the case; (2) limiting contingent fees to one-third of the lodestar; and (3) evidence in the record and a specific court finding that

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47. *Id.* at 717-19; see also *Louisiana Power & Light Co.*, 50 F.3d at 329; *Copper Liquor, Inc.*, 684 F.2d at 1092.

48. See *Nisby v. Commissioner's Court*, 798 F.2d 134, 137 (5th Cir. 1986); *Copper Liquor, Inc.*, 684 F.2d at 1093; *Johnson*, 488 F.2d at 717-19.

49. See *Louisiana Power & Light Co.*, 50 F.3d at 329; *Copper Liquor, Inc.*, 684 F.2d at 1092-93; *Johnson*, 488 F.2d at 717-19. Under Federal Rule of Civil Procedure 54(d)(2)(B), "[i]f directed by the court, the motion [for a claim for attorney's fees] shall disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." FED. R. CIV. P. 54(d)(2)(B).

50. If not produced by the requesting party, the district court may order the production of the contingency fee arrangement. See FED. R. CIV. P. 51.

51. See *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 723 (1987). The Court wrote:

At most, therefore, *Johnson* suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award, but there is nothing in *Johnson* to show that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as a whole.

*Id.*

52. *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987).

without risk enhancement, the plaintiff would have faced substantial difficulty in finding counsel in the local or other relevant market.<sup>53</sup>

### *B. Deviation From the Lodestar Method of Determining Legal Fees*

The Supreme Court and the circuit courts have made clear that the lodestar method of computing attorney's fees supersedes any contingent fee agreement.<sup>54</sup> In 1987, the United States Supreme Court held that contingency fee enhancements are prohibited in determining attorney's fees in fee-shifting statutes.<sup>55</sup> Instead, contingent fee agreements serve only as an enhancement under the *Johnson* factors. That is, the time/rate calculation is only enhanced by the twelve *Johnson* factors. The Supreme Court has reiterated time and again that there is to be no separate consideration or adjustment for the fact that a case was taken on a contingency.<sup>56</sup> Nevertheless, one of the twelve *Johnson* factors specifically requires consideration of "whether the fee is fixed or contingent."<sup>57</sup>

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53. See *id.* at 728-31.

54. See *Louisiana Power & Light Co.*, 50 F.3d at 324-25; *Copper Liquor, Inc.*, 684 F.2d at 1092.

55. See *Delaware Valley*, 483 U.S. at 727. This holding was upheld as recently as 1992 in *City of Burlington v. Dague*, 505 U.S. 557 (1992).

56. See *Delaware Valley*, 483 U.S. at 715 ("The issue before us is whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid"); *Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("[T]he risk of not prevailing, and therefore the risk of not recovering any attorney's fees is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.").

57. *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983). In *Delaware Valley*, the Supreme Court's plurality opinion attempts to distinguish between an overall contingency enhancement to the lodestar and the use of the contingency contract as one of the 12 factors "determining the reasonableness of a fee award" under the lodestar. *Delaware Valley*, 483 U.S. at 723.

But a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney . . . . At most, therefore, *Johnson* suggests that the nature of the fee contract between the client and his attorney should be taken into account when the determining the reasonableness of a fee award, but there is nothing in *Johnson* to show that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as a whole.

*Id.* The distinction is without a difference. It makes no real difference whether the contingency is considered as one of the 12 *Johnson* factors to determine reasonableness or whether it is considered as a separate enhancement factor for the lodestar; regardless of the order in which the contingency factor is considered, so long as it is given equal weight in the analysis, the result is the same. See *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar."). The plurality nevertheless provides for an enhancement, subject to a one-third limitation and the determination that there is a "real risk-of-not-prevailing:"

We deem it desirable and an appropriate application of the statute to hold that if the trial court specifically finds that there was a real risk-of-not-prevailing issue in the

Justice O'Connor, in a concurring opinion, suggested an alternate two-part test for evaluating contingency enhancements.<sup>58</sup> Under Justice O'Connor's test, a fee petitioner must first "establish that 'without an adjustment for risk the prevailing party would have faced substantial difficulties in finding [competent] counsel in the local or other relevant market.'"<sup>59</sup> Next, the fee petitioner must demonstrate that "the market rate of 'compensation . . . for contingency fee cases *as a class*' was different from cases in which payment was certain, win or lose."<sup>60</sup>

Although Justice O'Connor's lodestar enhancement properly focuses on the contingent fee agreement, her proposal suffers from the same problems as the hourly rate analysis under the conventional lodestar procedure. By emphasizing the "local or other relevant market," Justice O'Connor's test ignores the fact that contingent fee agreements are the product of a market. As such, contingent fee agreements better reflect fee agreements produced on that market and the value of the attorney work product in a particular case.

Justice O'Connor's upward contingency adjustment factors were proposed for adoption and rejected by the Supreme Court in *City of Burlington v. Dague*.<sup>61</sup> Justice Scalia, writing for the majority, rejected the use of the contingency fee to determine reasonable attorney's fees under the lodestar method.<sup>62</sup>

We have established a "strong presumption" that the lodestar represents the "reasonable" fee . . . . The Court of Appeals held, and Dague argues here, that a "reasonable" fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment. Fee-shifting statutes should be construed, he contends, to replicate the economic incentives that operate in the private legal market, where attorneys working on a contingency-fee basis can be expected to

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case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar. Any additional adjustment would require the most exacting justification.

*Delaware Valley*, 483 U.S. at 730. Even the court's choice of a "one-third" limit on the upward adjustment sounds ominously like a standard 33% contingency fee.

58. See *Delaware Valley*, 483 U.S. at 733-34 (O'Connor, J., concurring). However, Justice Blackmun has written, in a dissenting opinion to *Dague*, that, in enacting federal civil rights fee shifting statutes, Congress "did not intend to prohibit district courts from considering contingency in calculating a 'reasonable' attorney's fee." *Dague*, 505 U.S. at 570 (Blackmun, J., dissenting).

59. *Alberti v. Klevenhagen*, 896 F.2d 927, 935 (5th Cir. 1990) (quoting *Delaware Valley*, 483 U.S. at 733-34), *vacated in part*, 903 F.2d 352 (5th Cir. 1990).

60. *Id.* (quoting *Delaware Valley*, 483 U.S. at 733-34). The Fifth Circuit has adopted O'Connor's test.

61. *City of Burlington v. Dague*, 505 U.S. 557, 574 (1992).

62. See *id.*

charge some premium over their ordinary hourly rates.<sup>63</sup>

Justice Scalia, however, assumed what he sets out to prove—that “the lodestar represents the ‘reasonable’ fee.”<sup>64</sup> Furthermore, Justice Scalia dismissed the market for contingency fee claims, assuming that attorneys’ hourly rates are their “ordinary” rates.<sup>65</sup> The fact is that hourly rates are no more “ordinary” than contingency fee rates. The market for fees in both market and contingency claims determines the value of the attorney’s work product and sets the price accordingly.<sup>66</sup>

However, the renaissance of diversity among fee agreements between attorneys, law firms, and their clients increasingly has pressured the strict hourly fee lodestar to change.<sup>67</sup> Indeed, some federal district courts have already begun to stray from the strict lodestar approach by giving the contingent fee agreement negotiated by the parties greater weight in a courts’ lodestar analysis.

Although the rule has long been that a percentage of damages may be awarded as attorney’s fees in cases involving the recovery of a common fund, the percentage recovery approach has been employed with increasing frequency in common fund cases.<sup>68</sup> The District of Columbia Circuit and the Eleventh Circuit require the rule’s use.<sup>69</sup> At least five other circuits allow the use of either the lodestar approach or

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63. *Id.* (citations omitted).

64. *Id.* Yet such an assumption begs the question “what is reasonable?” It seems to be what Justice Scalia terms it to be. See PLATO, *supra* note 1, at 54; *supra* note 2 and accompanying text (discussing the majority rule that attorney’s fees should be reasonable).

65. See *Dague*, 505 U.S. at 562. The contingency fee is not “some premium” additional to the attorney’s fee. See *id.*; see also *Delaware Valley*, 483 U.S. at 737. “In the private market, the premium for contingency usually is recouped by basing the fee on a percentage of the damages recovered. The premium could also be computed as part of an hourly rate that the lawyer bills after the litigation succeeds.” *Delaware Valley*, 483 U.S. at 737. The contingency fee is the attorney’s fee recoverable on the market for contingency fee claims. See *infra* notes 87-88 and accompanying text.

66. See *infra* notes 80-91 and accompanying text (discussing the administrative burdens the lodestar method imposes on federal courts).

67. See 10 WRIGHT ET AL., *supra* note 14, § 2675.1. Wright noted:

The judicial analysis of what constitutes a reasonable fee is multi-faceted and dramatic changes regarding the handling of fee applications have occurred in the past few years. The calculation of attorney’s fees in statutory fee awards has been refined through several Supreme Court decisions. In addition, there has been a shift away from the lodestar calculation and back to a percentage-of-recovery analysis in cases in which attorney’s fees are premised on the recovery of a common fund.

*Id.*

68. See *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 459 (E.D. Pa. 1995).

69. See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condominium Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

the percentage recovery approach.<sup>70</sup> Additionally, the Fifth Circuit, although purporting to use only the lodestar approach, has seen its district courts apply the percentage recovery in combination with the lodestar with increasing frequency.<sup>71</sup> Moreover, while the percentage of recovery approach is supposed to be limited to common fund and class action cases,<sup>72</sup> the Seventh Circuit stated that district courts have discretion in the decision to apply a percentage method in other instances.<sup>73</sup>

In the Fifth Circuit, despite the warning in *Johnson* that the “criterion for the court is not what the parties agreed but what is reasonable,”<sup>74</sup> district courts frequently award contingency percentage awards from common funds recovered in litigation.<sup>75</sup> In order to ensure a reasonable percentage, however, courts continue to apply the *Johnson* factors.<sup>76</sup> In

70. See *In re* Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1296 (9th Cir. 1994); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lymphomed, Inc.*, 945 F.2d 969, 974-75 (7th Cir. 1991); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 n.10 (1st Cir. 1991).

71. See *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *In re* Combustion, Inc., 968 F. Supp. 1116, 1135 (W.D. La. 1997), *aff'd without opinion*, 159 F.3d 1356 (5th Cir. 1998); *Garza v. Sporting Goods Properties, Inc.*, No. SA-93-1082, 1996 U.S. Dist. LEXIS 2009 at \*92 n.35 (W.D. Tex. 1996).

The percentage of recovery approach has been used with more frequency in common fund cases. The District of Columbia Circuit and the Eleventh Circuit require its use. Four other circuits, the Ninth, Sixth, First, and Seventh allow the court to use either the lodestar or percentage approach. The Fifth Circuit appears to be staying with the lodestar.

*Garza*, 1996 U.S. Dist. LEXIS 2009 at \*97 n.35 (citations omitted). Although the Third Circuit has not officially adopted the percentage recovery for common fund cases, its district courts have adopted the method. See, e.g., *In re* U.S. Bioscience Sec. Litig., 1555 F.R.D. 116, 118 (E.D. Pa. 1994).

72. Compare *In re* Combustion, Inc., 968 F. Supp. at 1135, and *In re* Catfish Antitrust Litig., 939 F. Supp. 493, 500 (N.D. Miss. 1996) (citing numerous cases involving common funds and class actions), with *In re* Harrah's Entertainment, Inc. Secs. Litig., No. Civ. A. 95-3925, 1998 WL 832574, at \*3 (E.D. La. Nov. 25, 1998) (“[It] seems that a district court in the Fifth Circuit may exercise discretion in determining whether to apply the percentage fee or lodestar method.”).

73. See *Harman*, 945 F.2d at 975.

74. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

75. See *In re* Catfish, 939 F. Supp. at 500 (citing numerous cases that awarded contingency percentage awards).

76. See *id.* In *Garza*, the Western District of Texas reviewed a class action settlement and the accompanying award of attorney's fees. See *Garza*, 1996 U.S. Dist. LEXIS 2009 at \*92. The court noted: “In a common fund case, ‘a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.’” *Id.* (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

In a footnote, the court noted that the Fifth Circuit “appears to be staying with the lodestar” despite the fact that other circuits have turned to a percentage method of awarding attorney's fees. *Id.* at \*92 n.35. The court then underwent a thorough lodestar analysis including application of the 12 *Johnson* factors. See *id.* at \*93-125. In the end, the court arrived at an award of attorney's

other words, although these courts have allowed the recovery of percentage awards in common fund cases, they also apply the lodestar method to ensure “the reasonableness” of the amount.<sup>77</sup> Consequently, most applicants seeking attorney’s fees submit their lodestar application and analysis to arrive at and support the contingency fee percentage. Thus, the lodestar method seems to be simply a default method with which the courts are left to deal.<sup>78</sup>

As litigation has become more costly, clients have demanded increasing flexibility in the way they negotiate and arrange fee agreements for legal services with attorneys. This demand has resulted in variegated contingent fee agreements and combinations of contingent fee and hourly fee agreements on the market for legal services where the simple hourly fee agreement was once the rule. The federal courts are being asked why they consider percentage fee agreements in “common fund” cases only, and not in direct injury cases brought on a contingent fee arrangement.<sup>79</sup>

### C. Shortcomings of the Lodestar Method

The lodestar method of calculating attorney’s fees contains both administrative and evaluative problems. First, the lodestar creates administrative problems because the method places an inordinate administrative burden on the courts in the form of attorney’s fee award litigation. Second, the lodestar generates evaluative problems because it does not accurately value attorney work product according to the relevant market for attorney’s fees. Both of these problems can be addressed by incorporating market analysis of contingent legal fees into

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fees to class counsel in the amount of \$12.8 million. *See id.* at \*120-21. The class counsel had sought an award based on a contingency fee in the amount of \$13.5 million. *See id.* at \*98.

77. *See In re Combustion*, 968 F. Supp. at 1135; *In re Catfish*, 939 F. Supp. at 493. One court held:

It is the opinion of this Court that in common fund cases such as the instant case, Fifth Circuit precedent requires a district court only to justify its award of attorneys’ fees within the framework of the *Johnson* factors regardless of whether the award is determined by the lodestar or percentage of fund method. Further, a district court may exercise its discretion as to whether the fee evaluation more reasonably fits into a percentage of fund or into a lodestar calculation as long as either selection is supported by *Johnson* factor analysis.

*In re Combustion*, 968 F. Supp. at 1135.

78. *See* Lester Brickman, *ABA Regulations of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 247 (1996) (providing a “case study of self-regulation in a specific context: contingency fees”).

79. *See, e.g.*, *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (discussing the application of the percentage fee to common fund cases and the lodestar to statutory shifting fee cases).



the lodestar equation. Indeed, the contingent fee market provides a ready and accurate valuation of the attorney's work product, without the administrative cost to judicial resources.

### 1. Administrative Problems

The lodestar method of calculating attorney's fees places a significant burden on the courts and taxes judicial resources. Although a "second major litigation" should not arise from a request for attorney's fees,<sup>80</sup> some litigation over attorney's fees is unavoidable.<sup>81</sup> This is because the lodestar method requires courts to re-examine and re-litigate the case from the standpoint of the attorney's work product and attorney's fees. The party seeking attorney's fees has an incentive to maximize the fees by exaggerating the amount of work and the magnitude of success enjoyed in the prosecution of the case. The party resisting payment of attorney's fees has an incentive to unfairly downplay the amount of work and disparage the resulting success of the party prosecuting the case.<sup>82</sup>

The Report of the Third Circuit Task Force on Court Awarded Attorney Fees ("Third Circuit Task Force Report"), which identified nine deficiencies of the lodestar approach, emphasized the administrative problems of the lodestar method.<sup>83</sup> First, the analysis

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80. See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

81. This is because Federal Rule of Civil Procedure 54 requires that the party seeking attorneys' fees submit a request for fees and litigate the issue. See FED. R. CIV. P. 54(d). "On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78." FED. R. CIV. P. 54(d)(2)(C). "The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document." FED. R. CIV. P. 54(d)(2)(C).

82. See *Hensley*, 461 U.S. at 437. The *Hensley* Court observed: "The parties disagree as to the results obtained in this case. Petitioners believe that respondents 'prevailed only to an extremely limited degree.' Respondents contend that they 'prevailed on practically every claim advanced' . . . . [W]e leave this dispute for the District Court on remand." *Id.* at 432 n.6 (citations omitted).

83. The Third Circuit Task Force identified nine deficiencies of the lodestar approach:

(1) [the process] increases the workload of an already overtaxed judicial system . . . (2) the elements of [the process] are insufficiently objective and produce results that are far from homogeneous . . . (3) [the process] creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law . . . (4) [the process] is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount . . . (5) [the process] leads to other abuses . . . (6) [the process] creates a disincentive for the early settlement of cases . . . (7) [the process] does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement will be fostered . . . (8) [the process] works to the particular disadvantage of the public interest bar . . . and (9) considerable confusion and lack of predictability remain in its administration.

under the lodestar is more burdensome than a contingent fee evaluation. Litigation over attorney's fees can become both more complicated and more time consuming than the underlying lawsuit because the analysis of the hourly fees requires the submission of time records prepared by the attorneys and comparison to fees in the relevant market.<sup>84</sup> Indeed, the failure of attorneys to present detailed time records of hours expended may lead to denial or reduction of the fee requested.<sup>85</sup> Moreover, in the most complex forms of litigation, the lodestar method may require the court to scrutinize the "prevailing rates charged in the community for similar work, the availability of adequate local counsel, customary billing rates, the experience of the attorney[s], and the complexity of the work" to determine hourly rates for lawyers with varying expertise, doing different work in different parts of the country.<sup>86</sup> Likewise, underlying lawsuits, which present multiple and distinctly different claims for relief, further increase and complicate the burden upon the court to determine which claims were meritorious and which deserved enhancement under the lodestar method.<sup>87</sup>

Rehashing the work performed on the case along with the accompanying representation of the hourly market of fees creates a significant burden on the courts and an inefficient use of scarce judicial resources. The analysis of the contingent fee market, on the other hand, does not require the submission of time records, only the submission of the contingency fee agreement. The market determines the reasonableness of this fee agreement and the court will determine the amount of recovery for each claim by the merits of the prosecution of that claim.<sup>88</sup>

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*Report of Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, 246-49 (1985).

84. See Berger, *supra* note 3, at 292.

85. See 10 WRIGHT ET AL., *supra* note 14, § 2675.1.

86. *Id.*

87. See *Hensley*, 461 U.S. at 434-35.

88. Of course, the market for claims accommodates different types of claims. Although an antitrust claim differs significantly in many important aspects from a personal injury claim, the *function* of the market is the same for each. Antitrust claims involve a specialized substantive law, and the market for antitrust claims, antitrust attorneys and antitrust firms is specialized accordingly. The substantive law creates a demand for certain claims as they arise, and that demand is met with the supply of lawyers practicing that type of law. Where claims arise in various jurisdictions, such as personal injury claims, differences in state and local law and practice create localized markets for such claims. Where the substantive law governing claims are not limited geographically, the market for such claims tends to be unlimited geographically as well. Antitrust claims, for example, which are not limited by state borders or local lines, may require that lawyers specializing in antitrust be retained to prosecute claims from across vast distances.

In addition, federal courts do not apply the lodestar method uniformly. The resulting chaotic state of law fosters an excessive amount of litigation concerning the proper fee amount.<sup>89</sup> At times, appellate courts may apply the *Johnson* factors differently than trial courts. The inevitable consequence of the lodestar procedure is the burgeoning of attorney's fee litigation on both the appellate and the trial court levels. For example, courts differ as to which hours may be included in computing the lodestar figure—sometimes including time spent in preparing the fee application itself.<sup>90</sup> Courts apply varying standards of reasonableness, leading to divergent decisions regarding attorney's fees. Accordingly, the varying standards prevent parties from planning for and providing for the award of attorney's fees and increases litigation over the varying standards.<sup>91</sup>

## 2. Evaluative Problems

Perhaps the more important problem with the lodestar method is that it does not accurately value the attorney's work product. Regardless of the number of factors considered by the courts, no precise formula for computing attorney's fees exists.<sup>92</sup> This lack of precision imbues the lodestar method with an unhealthy dose of subjectivity as courts vary in the weight or consideration given to each factor.<sup>93</sup> The lodestar method, further, offers "no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all."<sup>94</sup> Likewise, the lodestar

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89. See Berger, *supra* note 3, at 292.

90. See 10 WRIGHT ET. AL, *supra* note 14, § 2675.1.

Some fee opinions also suggest various categories of legal work into which the time record should be subdivided. A listing of some of the factors reviewed by the courts when setting fees illustrates the wide array of things considered. These include the reasonableness of the time expended, the results obtained or benefit conferred, equitable considerations, and delays in payment.

*Id.*

91. One commentator noted:

To prevent [contingency fee] windfalls would require much more extensive judicial oversight of the fee system and might embroil judges in detailed inquiries into the amounts of work actually performed in winning large awards. It is far from clear that avoiding excessive fees would be worth the added time and cost of forcing heavily burdened judges to conduct such investigations.

Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, 180 n.31 (1995) (quoting BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* 27-28 (1994)).

92. See *Hensley*, 461 U.S. at 436.

93. See Berger, *supra* note 3, at 293.

94. *Id.* at 286-87.

method often flies in the face of the proposition that an attorney should recover a fully compensatory fee, where a plaintiff has achieved his or her desired results.<sup>95</sup>

Yet after over twenty years of applying these factors and achieving poor results, these factors remain. Instead of giving various weight and consideration to the *Johnson* factors, the market itself provides a more accurate determination of the degree to which claims were successful. Nevertheless, in *Hensley v. Eckerhart*, the Supreme Court struggled with determining the degree of success on which to base attorney's fees.<sup>96</sup> The problem facing the Supreme Court is how to determine "reasonable fees" based on the attorney's work product and the attorney's success without any objective valuation of that work or success.<sup>97</sup> The market for legal claims, however, has already made a determination of the value and merit of the claim, and this is tested by the prosecution of the claim and trial or settlement. Through the contingent fee arrangement, the "critical factor" of the "degree of success" necessarily calculates the attorney's fee based on the success of the claim.

The Third Circuit Task Force Report emphasized the unwarranted sense of precision and the inherent subjectivity of the lodestar method in its critique.<sup>98</sup> Since the publication of the Third Circuit Task Force Report, federal courts have acknowledged and grappled with the lack of mathematical precision.<sup>99</sup> Instead of tapping the legal market for services to determine the market price for those services, the lodestar method requires that the trial court simulate the market for attorney's

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95. See *Hensley*, 461 U.S. at 435.

96. See *id.* at 435. The Court remarked:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

*Id.* at 436.

97. See Drummonds, *supra* note 23, at 868 ("Of course, to say that a percentage contingent fee must be 'reasonable' provides no guidance to lawyers and judges who must apply that standard in particular circumstances.").

98. *Report of Third Circuit Task Force*, *supra* note 83, at 246-47. Specifically, the Third Circuit Task Force notes that the "process creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law" and that the process is "subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount." *Id.*

99. See *id.*

fees and make an artificial economic finding of reasonable attorney's fees. The valuation of the attorney's work product under the contract is not "manipulation," as it is termed by the Third Circuit. Rather it is the actual value of the attorney's work product based on an objective and real world valuation.<sup>100</sup>

The lodestar method mixes the markets for hourly rates and contingent fees, rather than exclusively utilizing one or the other. Indeed, the lodestar method's "preoccupation with attorneys' time and market rates encourages the expenditure of excessive or unnecessary hours."<sup>101</sup> The Fifth Circuit noted that the hourly rate approach "equates professional services to those of laborers and mechanics."<sup>102</sup> The Fifth Circuit further observed a "flash of brilliance by a trial lawyer may be worth far more to his clients than hours or days of plodding effort."<sup>103</sup> In essence, the lodestar method ignores the value placed on the attorney's work product by the market itself.

The lodestar method ignores the fact that, in addition to legal services, a contingent fee arrangement also provides credit and legal-cost insurance.<sup>104</sup> Accordingly, "in the private market, lawyers charge a

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100. See *infra* Part IV (suggesting that the attorney's work product valuation and benefits become part of the lodestar method of calculating and awarding attorney's fees).

101. *Report of Third Circuit Task Force*, *supra* note 83, at 262. Federal Rule of Civil Procedure 54 requires that the parties submit time records as part of their request for attorney's fees. FED. R. CIV. P. 54(d)(2)(C); see also *Copper Liquor, Inc. v. Adolph Coors, Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982), *overruled by J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *Berger*, *supra* note 3, at 292 ("A second consequence of the chaotic state of the law is an excessive amount of litigation concerning the proper fee amount."). Thus, the lodestar requires that the court re-examine and re-litigate the case from the standpoint of the attorney's fees. The Third Circuit Task Force noted that the emphasis on hours worked "creates a disincentive for the early settlement of cases" and "gives attorneys an incentive to accumulate hours spent on the case" in order to inflate recoverable fees. *Report of Third Circuit Task Force*, *supra* note 83, at 247-48. The party seeking attorney's fees has an incentive to maximize attorney fees by exaggerating the amount of work and the magnitude of success enjoyed in the prosecution of the case. The party resisting payment of attorney's fees has an incentive to unfairly downplay the amount of work and disparage the resulting success of the party prosecuting the case. The Seventh Circuit, however, rejected the argument that the lodestar method should not be used because it is inefficient and burdensome reasoning that: (1) the lodestar process responds to concerns that a percentage approach resulted in over-compensation for attorneys; (2) the lodestar process and use of multipliers provides a means of accounting for the hours and rate reasonable in the type of case and for the risk an attorney assumes in undertaking the case; and (3) the lodestar process encourages attorneys to assess the marginal value of continuing to work on the case. See *Harman v. Lymphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991).

102. *Foster v. Boise Cascade, Inc.*, 577 F.2d 335, 337 n.1 (5th Cir. 1978).

103. *Id.*

104. See Richard W. Painter, *Symposium on Fee Shifting: Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 653 (1995).

premium when their entire fee is contingent on winning.”<sup>105</sup> Courts, nonetheless, cling to hourly rates in a legal marketplace that has seen something of a renaissance in the ways attorneys and clients contract fee agreements. Despite the adherence to the lodestar method of calculating attorney fees, the use of contingency fee arrangements, though still most prevalent in personal injury litigation, has spread to antitrust litigation, shareholder derivative suits, patent litigation, mergers and acquisitions, securities litigation, and even lobbying.<sup>106</sup>

The evaluative problems created by the lodestar method of calculating attorney’s fees further lead to increased agency costs. By importing the hourly rates into the contingency fee valuation, the courts import the problems with charging client’s hourly fees without any accompanying evaluative benefit. Although courts may be able to recognize thoroughly superfluous and unnecessary work, the lodestar method, because it focuses upon hourly rates rather than results, creates an incentive to maximize time spent on a plaintiff’s case.<sup>107</sup> This, in turn, may create a disincentive for the early settlement of cases.<sup>108</sup>

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105. *Pennsylvania v. Delaware Valley Citizens’ Council*, 483 U.S. 711, 735 (1987).

106. See Donald L. Abraham, *Investor Financed Lawsuits: A Proposal to Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 SYRACUSE L. REV. 1297 (1992); Painter, *supra* note 104, at 626.

107. See 10 WRIGHT ET AL., *supra* note 14, § 1803. The Third Circuit Task Force further illustrates this problem by emphasizing that “the process leads to other abuses; and . . . the process creates a disincentive for the early settlement of cases . . . .” *Report of Third Circuit Task Force*, *supra* note 83, at 247-48. In his concurrence to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Justice Brennan articulated similar concerns:

Within the confines of individual cases, from prevailing plaintiffs’ point of view, appellate litigation of attorney’s fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs’ counsel—have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.

*Hensley*, 461 U.S. at 455-56 (Brennan, J., concurring in part and dissenting in part).

108. See *Report of the Third Circuit Task Force*, *supra* note 83, at 246-49. The Report of the Third Circuit Task Force notes that the process “does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered . . . . [C]onsiderable confusion and lack of predictability remain in its administration.” *Id.* at 248-29. Justice Brennan observed:

In systemic terms, attorney’s fee appeals take up lawyers’ and judges’ time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988’s straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein’s monster meanders its well-intentioned

Utilizing hourly rates can create disincentives for providing an efficient work product to clients and consumers of the market for legal services.

“The high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation.”<sup>109</sup> No matter how many factors the courts consider or how they weigh each in their consideration, “[t]here is no precise rule or formula for making these determinations.”<sup>110</sup> “Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.”<sup>111</sup> Instead of applying factors and disagreeing as to their weight in consideration, it should be left to the market to determine which claims were successful and how successful they were.

### III. REFORMULATING THE LODESTAR TO INCORPORATE THE MARKET FOR LEGAL CLAIMS AND ATTORNEY FEES

Both the administrative and evaluative problems of the lodestar can be addressed by incorporating the market for legal claims and attorney’s fees into the lodestar calculation. The market for legal claims encompasses both the factors that the federal court considers in determining attorney’s fees and the factors that burden the federal court in administrative determinations and costs.

#### A. *The Market for Legal Claims*

Like a mineral interest or a patent, a legal claim is considered a property interest.<sup>112</sup> In most jurisdictions, with some exceptions,<sup>113</sup> a

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way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake.

*Hensley*, 461 U.S. at 455 (Brennan, J., concurring in part and dissenting in part).

109. *Berger*, *supra* note 3, at 293.

110. *Hensley*, 461 U.S. at 436.

111. *Id.* at 435.

112. See TEX. PROP. CODE ANN. § 12.014 (West 2000); *Grace Robotics, Inc. v. Oaklawn Bank*, 914 S.W.2d 633, 639 (Tex. Ct. App. 1995) (holding that a litigant may assign his interest in a breach of contract action); see also Frank B. Cross, *The First Thing We Do, Let’s Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 676 (1992) (noting the wealth building effects of lawyer’s practices and the “Productive, Economically Facilitating Activities” of lawyers).

113. In some jurisdictions, medical and legal malpractice claims may not be assigned. See, e.g., *Schroeder v. Hudgins*, 690 P.2d 114, 119 (Ariz. Ct. App. 1984) (holding that a legal malpractice claim was not assignable); *Washington v. Fireman’s Fund Ins. Co.*, 459 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 1984) (per curiam) (“[W]e cannot permit enforcement of a legal malpractice action which has been transferred by assignment.”); *Clement v. Prestwich*, 448 N.E.2d 1039, 1042 (Ill. App. Ct. 1983) (concluding that a legal malpractice claim was not assignable); *Moorhouse v. Ambassador Ins. Co., Inc.*, 383 N.W.2d 219 (Mich. Ct. App. 1985) (recognizing that assigning a legal malpractice claim is barred).

legal claim is defeasible and subject to assignment. A contingency fee is an interest in that property claim. Accordingly, principles from property law should be observed by courts in dealing with contingency fee interests, legal claims and attorney's fees. Indeed, the law relating to property interests in oil and gas or patents provides a better legal framework for analysis of attorney's fees and a better model for courts to follow in ascertaining and awarding attorney's fees than that provided by the Model Rules. These bodies of law provide economic principles upon which economic models can be constructed, analyzed and anchored in economically based public policy considerations. The same cannot be said for the rules of disciplinary procedure.<sup>114</sup>

Just as there is a market for any property interest, there is a corresponding market for legal claims and contingent attorney's fee interests.<sup>115</sup> Fee arrangements are typically determined privately

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114. "Of course, to say that a percentage contingent fee must be 'reasonable' provides no guidance to lawyers and judges who must apply that standard in particular circumstances. DR 2-106(B) lists factors courts should consider in determining the reasonableness of a fee; one factor is '[w]hether the fee is fixed or contingent.'" Drummonds, *supra* note 23, at 868; *see supra* note 8 (detailing the factors under DR 2-106(B)).

Implied in an attorney's fee award is that something in legal claims and contingency fees needs to be disciplined. Yet every attempt to "discipline" attorney's fees based on ethics and the professional responsibility of lawyers strays decidedly from principles of economics and law and economics analysis. *See* Horowitz, *supra* note 91, at 183. The result is the sound of lawyers beating their chests. "Although some judges, media people, and the defense bar have characterized attorney's fees as a source of abuse and a stain on the escutcheon of the administration of civil justice, in reality there is a virtual absence of empiric data showing any significant incidence of excessive fees." 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1803 (1986). Why do courts treat their own purveyors differently? The answers to the question seem to lie somewhere between a vague duty to regulate the profession and the public's obsession with lawyers and attorney's fees. "Yet, as with other legal issues, it is within the covers of law reviews and specialty journals in economics that much of the debate over the social utility of various tort rules and their reform takes place." John C. Moorehouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 667 (1998). One commentator remarked:

My personal view is that many cases which are brought by lawyers operating with contingent fee contracts have enabled plaintiffs to secure a measure of justice which would otherwise have been difficult or impossible to obtain. I have seen many cases that support that belief. So, in a general sense, the prohibition of contingent fee contracts as a method of financing litigation is a difficult argument to make. The more difficult questions are whether the attorney-client contingent fee relationship needs to be supervised or regulated and, if so, by whom and in what form.

Charles Kocoras, *Contingent Fees—A Judge's Perch*, 47 DEPAUL L. REV. 421, 421 (1998).

115. *See* Peter Charles Choharis, *A Comprehensive Market Strategy For Tort Reform*, 12 YALE J. ON REG. 435, 443 (1995) (proposing "a market for the sale and exchange of tort claims"); Gergen, *supra* note 11, at 1010 (using "an oil and gas lease as an example, though much of the analysis could as well apply to other familiar contracts, including exclusive-listing contracts with real estate brokers to sell homes, contingent-fee contracts for legal services, and book-publishing contracts").



between attorney and client.<sup>116</sup> The market for legal claims prices the legal claim on the basis of the required attorney work product and expertise as well as the actual merits of the particular claim.

The value of a given claim would be determined by the expected recovery from the claim. Thus, the claim holder will negotiate with attorneys with varying levels of ability, and those with the most expertise and experience may attract the most valuable claims and command a greater portion of the expected return.<sup>117</sup> Conversely, lesser-qualified attorneys will command lesser, though proportionate, fee percentages in their fee agreements and will attract less valuable claims. Likewise, attorneys will pay for a given claim according to what they think it will be worth, though they may differ as to their assessment of the value of a given claim. The competition for the claim creates a market for legal claims that factors in the risk accompanying the claim into the market price.<sup>118</sup> Therefore, by the time the fee agreement is executed, the market for legal claims has already valued the legal claim and the accompanying attorney's fees. The best way for a court to value the attorney's work product for an award of attorney's fees is to use the market for the attorney's work product already in place.

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116. See Berger, *supra* note 3, at 283 (examining the "Current State of the Law" 22 years ago regarding court-awarded attorney's fees and identifying the same problems 22 years ago as today).

117. "The contingency fee offers 'a key to the courthouse door' to some persons with valid claims." 2 STEVEN E. PAGALIS & HARVEY F. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE* § 1:5 (1980) (quoting William B. Schwartz & Neil K. Komisar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 *NEW ENG. L. MED.* 1282, 1288 (1978)); see also Vicki Giotkin Adler, *Lawyers' Fees: A Cornucopia For Client Complaints*, 19 *ARIZ. ST. L.J.* 71, 84 (1987) ("The contingent fee, when properly used, is a valuable social and legal device."); Eric M. Rhein, *Judicial Regulation of Contingent Fee Contracts*, 48 *J. AIR L. & COM.* 151, 155-58 (1982) (presenting a history of the contingent fee contract in the United States); Jeffrey L. Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 *S. CAL. L. REV.* 1363, 1374 (1991) (proposing nonpercentage contingency fees for expert witnesses' fees).

118. Like every other market, the market for claims is not a perfect market. There are barriers of entry and limitations on supply in the form of state bar licensing, and the demand for the market for claims is created by the substantive law. Although many of the limitations on the market for claims are unavoidable in any market for professional services, these limitations can be used to adjust the market for optimum performance. Consider the legal claims that arise when a duty established by the substantive law is breached. Limiting or expanding substantive causes of action, for example, can provide consumers with additional or fewer rights in the business environment. The result is more or less claims and demand for attorneys. Similarly, limiting or expanding licensure for attorneys can provide the market for claims with additional or fewer choices of legal counsel. Accordingly, although the legal market for claims has limitations, it also has possibilities, and this Article explores only one of them.

*B. Proposed Legal Claims Analysis Under Oil and Gas Law Principles*

As noted above, a mineral interest in an oil and gas lease is a property interest.<sup>119</sup> Under an oil and gas lease, the oil and gas operator and the property interest owner enter into agreement to drill for and produce oil and gas from the property. Like the attorney and client with regard to their legal claim, the mineral interest owner and the oil and gas operator form a joint venture for production from the property interest in question.<sup>120</sup>

The operator provides his expertise, training and industry to develop the property interest of the mineral interest owner. They sign a contract, account for expenses, and the mineral interest owner receives production royalty less these expenses. If there is no recovery for the oil and gas operator, there is no recovery for the mineral interest owner. There are no limitations on recovery by either joint venturer. The oil and gas operator and mineral interest owner pool their risk. There are no reasonableness limits on the production under prevailing oil and gas law principles. In this way, the law creates an incentive for the operator to efficiently utilize his expertise and training to maximize production of the minerals for the benefit of the mineral interest owner. These incentives, furthermore, limit or restrict agency costs.

Similarly, in the attorney-client relationship, the attorney enters into a joint venture relationship to maximize the client's claim. The attorney provides expertise, training and industry to develop the property interest of the client. They sign a contract, account for expenses, and the client receives production recovery less these expenses. Under a contingency arrangement, if the client recovers nothing, so too does the attorney. The attorney and client pool their risk.

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119. See *supra* note 112 and accompanying text (comparing legal claims to interests in minerals or patents).

120. "Contingent-fee arrangements alternatively could be viewed as joint ventures whereby lawyers, instead of conducting litigation only for clients' benefit, agree with clients to litigate for their mutual benefit. Clients would contribute their claims to the ventures, and lawyers would contribute their time, putting both at risk." Painter, *supra* note 104, at 655 n.145. "Such risk sharing by lawyers and clients obviously increases the likelihood that plaintiffs will prosecute their claims." *Id.* at 654-44. Although in some jurisdictions such a relationship is not considered to be a joint venture arrangement by law, it acts functionally as one in every state. See generally UNIF. PARTNERSHIP ACT § 7 (1996) (explaining that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business); UNIF. REVISED PARTNERSHIP ACT § 2.02 (1996) (equating "partnership" with "joint venture"); *Id.* at § 2.03 (1996) (setting forth factors to determine "joint venture," such as the "right to receive a share of profits of the business," "expression of an intent to be partners in the business," "participation or right to participate in control of the business," and "sharing or agreeing to share . . . losses of the business . . .").

In the attorney-client relationship, however, there are limitations on recovery. There are reasonableness limits on the production under prevailing law of attorney's fees. In this way, the law creates a disincentive for the attorney to efficiently utilize his expertise and training to maximize production of the claim for the benefit of the client. Without the artificial "reasonableness" limitation, the lawyer's incentive is to maximize the value of the client's property, recovery for his client's claim.<sup>121</sup> The opposing lawyer's incentive is converse. Economics principles state that property resources should be maximized because of scarcity. Disincentives to efficient recovery, whether it be through trial or various forms of settlement, waste judicial resources and provide a poor quality service to clients of the legal profession. The full and efficient use of judicial resources should comport with the client's interest in recovery for breach of a duty created by the substantive law. If the lawyer's fees are limited, the lawyer's incentives and interests are no longer in accord with those of the client.

"To achieve full enforcement of the private rights created by statutes which include attorneys' fee provisions, the resources of the private bar must be brought to bear."<sup>122</sup> Although "no single fee arrangement can perfectly align the interests of the lawyer with the interests of the client in all circumstances[,]"<sup>123</sup> the great weight of scholarly opinion is that contingent fee agreements do so better than any other fee arrangement.<sup>124</sup>

### *C. Proposed Legal Claims Analysis Under Patent Property Law Principles*

A patent holder is also the owner of a property interest. The holder of the patent may sell the patent on the market, or may sell rights to use of the patent for payment of royalties. The value of the patent is determined by its utility and efficiency in its utilization of scarce resources. Patents are sold and valued on the free market; their use is protected by law; there are no artificial "reasonableness" restraints on

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121. Under the principles of oil and gas law, there are implied covenants to prevent waste of minerals and to protect the mineral interest owner from inefficient operators. The purpose of these covenants is to fully develop and utilize societal resources.

122. Berger, *supra* note 3, at 313.

123. Robert H. Mnookin, *Negotiation, Settlement, and the Contingent Fee*, 47 DEPAUL L. REV. 363, 364 (1998).

124. See Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 508 (1996) (discussing principal-agent problems); Howard M. Tollin & Tammy Feman, *Litigation Management: What Legal Defense Costs Are Reasonable and Necessary*, 63 DEF. COUNS. J. 529, 536 (1996) (proposing auditing and surveillance of outside counsel and litigating defense costs to dissuade future excessive costs).

the use and profits accrued from patents. In this way, the market seeks to ensure that the most efficient user of the patent will obtain the right to put it to use. Courts allow and encourage the sale of patents and patent owners to utilize their property as they see fit, protecting patent holder's rights from trespass or infringement as an incentive to the creation of further patents and the more efficient utilization of society's scarce resources.

Some jurisdictions limit the assignability of legal claims.<sup>125</sup> The holder of the claim may not sell the claim on the market, or the holder of the claim may not sell the rights to the claim for monetary compensation. This creates a serious problem in the legal market of claims. The value of the claim should be determined by its merit and the efficiency with which it can be prosecuted.

When claims are unrestricted, they can be sold and valued on the free market and rights to the claims can be protected by law. Artificial "reasonableness" restraints on the use and profits accrued from claims distort the market and its valuation function. In this way, the market can no longer ensure that the most efficient user or prosecutor of the claim will obtain the right to put it to use. Where courts allow and encourage the sale of patents and allow patent owners to utilize their property as they see fit, courts retard similar assignments on the market for contingent fee claims. The price for prosecuting the contingent fee claim is not determined by its substantive merit, but by the "reasonableness" factors and ethical standards. As a result, the market for claims operates less efficiently in pricing the claim and less efficiently in allocating scarce judicial resources.

#### *D. Addressing Administrative Problems of the Lodestar Method With the Market for Legal Claims*

It seems only logical to award attorney's fees according to the type of fee arrangement chosen by the parties. If the case is an hourly case, the

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125. See, e.g., *Schroeder v. Hudgins*, 690 P.2d 114 (Ariz. Ct. App. 1984) (stating that legal malpractice claim is not assignable); *Washington v. Fireman's Fund Ins. Co.*, 459 So. 2d 1148 (Fla. Dist. Ct. App. 1984) (same); *Clement v. Prestwich*, 448 N.E.2d 1039 (Ill. App. Ct. 1983) (same); *Moorhouse v. Ambassador Ins. Co., Inc.*, 383 N.W.2d 219 (Mich. Ct. App. 1985) (same). One commentator noted:

A plausible argument might be that assignability would produce a more objective valuation of claims by people who are specialists in such evaluations. After all, if the present holder of a claim placed an unduly low value on it, there would be money to be made from detecting this fact and purchasing the claim for a figure closer to its real value. Indeed, a market-like valuation of one's claim might induce a downward re-valuation by one who overvalues his cause of action.

Painter, *supra* note 104, at 634 n.41.

attorney's fees should be determined on an hourly basis. If the case is taken on a contingency, the attorney's fees should be determined on the basis of the value the lawyer brings to the claim in accordance with the contingency fee agreement. By deferring to the market for legal claims, the trial court relieves itself of the artificial lodestar hourly valuations and absolves itself of many of the lodestar's administrative problems.<sup>126</sup> Even the harshest and most relentless critics of contingent fees and the market for claims have to admit that the incorporation of the market for contingent fees and legal claims would relieve a significant burden from the courts.<sup>127</sup> The recovery is in line with the fee.<sup>128</sup> The courts further policies implemented in the substantive law, whether statutory or common law. For example, courts in effect reduce the volume of injury and socialize injury cost; courts enforce valid contracts between parties that serve economic interests. In the end, the courts maximize the gross social product.<sup>129</sup>

Contingency fee agreements focus upon risks and results in a case, rather than upon an artificial determination of whether the fee represents standard practice or reasonableness.<sup>130</sup> Moreover, contingency fee agreements create an incentive for attorneys to screen out weak or gratuitous cases, thereby maximizing scarce judicial resources.<sup>131</sup> Finally, using the contingency fee agreement, rather than the lodestar method, absolves the trial court of the problem of wildly inconsistent attorney's fee awards because the trial court no longer creates artificial markets.<sup>132</sup>

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126. See Choharis, *supra* note 115, at 479-92 (describing the advantages of a market for claims).

127. See LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* 24 (1994) (noting the excessive costs to courts in determining appropriate fee arrangements on a case-by-case basis); Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383 (1989) (arguing for the creation of a market of "unmatured tort claims" based on accidents that may occur in the future); Charles J. Goetz, *Commentary on "Towards a Market in Unmatured Tort Claims": Collateral Implications*, 75 VA. L. REV. 413, 415 (1989) (displaying skepticism for Cooter's hypotheses).

128. A commentator noted that "the lawyer in a [contingent fee agreement] is compensated for accepting the risks inherent in the particular litigation, time spent on the case, and the loan value of the lawyer's services. Accordingly, contingent fees are appropriately higher than regularly hourly rates." Drummonds, *supra* note 23, at 864 n.23; see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 624 (5th ed. 1998) (discussing contingency fee contracts as a solution to the "liquidity problem" many plaintiffs experience).

129. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970).

130. See Drummonds, *supra* note 23, at 863.

131. See Rhein, *supra* note 117, at 155-58; Parker, *supra* note 117, at 1366 n.9.

132. See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 302 (1998) (noting that "returns from contingency fee practice are

*E. Addressing the Evaluative Problems of the Lodestar Method Using the Market for Legal Claims*

Contingency fee agreements solve a problem plaguing the federal courts since the lodestar's adoption in *Hensley v. Eckerhart*. The precise issue facing the Supreme Court in *Hensley* was how the trial court was to apportion attorney's fees among successful and unsuccessful claims.<sup>133</sup> The parties, forbidden to utilize contingency fee considerations, were left suggesting solutions to the problem that border on the comical.<sup>134</sup> The Supreme Court introduced and adopted the twelve lodestar enhancement factors,<sup>135</sup> seizing upon one of the factors stating that "'the amount involved and the results obtained,' indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded."<sup>136</sup> However, the lodestar does not solve the problem presented in *Hensley*. The trial court's determination of how the "results obtained" from various claims justify the hourly lodestar calculation is explained only by emphasis upon the deference to the district court's discretion.<sup>137</sup> Except for the additional twelve enhancement factors, the district courts are left essentially where they began.

The contingency fee solves the *Hensley* problem before it even arises. That is because the attorney and client will agree to a percentage fee for their claims, and different claims will recover different types of damages, depending on the substantive law governing each. The successful claims will recover damages ascertained by the fact finder, and the contingency fee provides a measurement for the attorney's work product in each. Therefore, the attorney's fee for different claims is determined not by the issues or the ubiquitous discretion of the trial

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at best 'somewhat' better" than in hourly practice).

133. "The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983).

134. *See id.* at 428. The Court held:

[Petitioners'] suggested method of calculating fees is based strictly on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Under this method no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues.

*Id.*

135. *See id.* at 430 n.3.

136. *Id.* at 430 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974)).

137. *See id.* "We reemphasize that the district court has discretion in determining the amount of a fee award." *Id.* at 437.

court. Rather, the attorney's fee is determined by the value of the claim under its substantive law. Importantly, if a particular claim is only partially successful, and it recovers some portion of damages, then the contingency values the attorney's work product accordingly and provides for the appropriate attorney's fee by apportioning a proportionate amount. This apportionment is not provided for under the lodestar method.

The rationales behind the acceptance of contingency fees vary. Most commonly, proponents justify the use of contingency fees to provide access to the judicial system to those who would otherwise not be able to afford legal representation.<sup>138</sup> A second justification, however, hypothesizes that contingency fees create incentives for attorneys, whose compensation depends upon winning, to work harder for the client.<sup>139</sup>

As the legal market has changed over the past two decades, attorneys, firms and their clients have made dramatic innovations in the way they contract for fees. In addition to hourly fees, attorneys and clients contract to handle cases based on set fees for a certain volume of cases, mixed contingent and hourly fees, and simple contingency fee agreements.

Today lawyers and their clients contract for fees in many innovative and creative ways, and these innovations serve not only to provide needed flexibility to the contracting parties, they provide an economic benefit and improve the services clients can request and receive from their attorneys. Therefore, the lodestar method's narrow focus on hourly rates seems not only limited but outdated.<sup>140</sup> Finally, turning to

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138. See Moorehouse et al., *supra* note 114, at 671, 692 (finding in a survey of law and economics scholars that 80% either disagreed or strongly disagreed with the proposition that "[p]ermitting attorneys to charge contingent fees is inefficient" with only 5% agreeing). The public perception of attorneys and contingency fees is problematic because it misses a valuable service that lawyers and the legal system provide society and the value of contingency fees has never been recognized in law or economics literature. Courts provide a means of settling disputes and enforcing contracts and binding agreements. As a means of dispute resolution on the free market of legal services, enforcement of property rights is an economic necessity and valuable to the economy. See *City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (Blackmun, J., dissenting). Blackmun argues that "[t]he strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation." *Id.* (Blackmun, J., dissenting).

139. See *infra* note 149 and accompanying text (discussing justification of contingency fees).

140. See 7B WRIGHT ET AL., *supra* note 114, § 1803. The author comments that:

[T]he notion that there are fixed hourly rates that can be attributed to all lawyers . . . is somewhat of an illusion. These rates have never existed for contingent fee lawyers, since time and hourly rates are irrelevant for their type of practice . . . . Furthermore, at present there is significant judicial disagreement regarding which hours may be in-

hourly rate models for attorney's fees after clients receive access to the courts through contingent fees serves as a disincentive for that form of access.<sup>141</sup>

Although contingent fee arrangements are criticized on the assumption that "attorneys trade off time for returns that gradually diminish with effort,"<sup>142</sup> the fact that there are varying degrees of qualifications of available lawyers to the contingent fee claimant ensures that the market will respond to the value of the claim. In other words, the market simply ensures that the expertise and quality of the lawyer comports with the value, merit and fee accompanying the claim.

Contingency fees, by their very nature, provide attorneys with an incentive to do a good job.<sup>143</sup> Although "no single fee arrangement can perfectly align the interests of the lawyer with the interests of the client in all circumstances[,]"<sup>144</sup> the great weight of scholarly opinion is that contingent fee agreements do so better than any other fee arrangement.<sup>145</sup> Moreover, by aligning the incentives of both the lawyer and the client to match, the lack of sophistication of the client in determining the value of the fee is addressed. Judge Posner, in fact, contends that the existence of agency costs provides a rationale for allowing the "outright sale of legal claims . . ."<sup>146</sup> In effect, the contingent fee lawyer *takes over* the client's role and brings the sophistication and expertise necessary to ensure the greatest recovery. Both have an incentive to maximize their recovery.<sup>147</sup>

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cluded and which excluded. For example, there are decisions both ways on whether time expended in preparing the fee application itself may be included, although the clear weight of precedent is affirmative.

*Id.*

141. A major hurdle in obtaining adequate compensation for losses is the prevalence of prohibitively high access fees. See *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (stating that contingency fees "often . . . provide the only practical means by which one having a claim can economically afford, finance and obtain the services of a competent lawyer to prosecute his claim"); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 241 (1998) (tracing historical support for contingency fees as a means of allowing poor persons to assert their legal rights); Mnookin, *supra* note 123, at 364-66 (1998) (addressing how bargaining power imbalances would be affected by eliminating the contingent fee in favor of litigation insurance with fee shifting); Parker, *supra* note 117, at 1368.

142. Gergen, *supra* note 11, at 1016.

143. See POSNER, *supra* note 128, at 625.

144. Mnookin, *supra* note 123, at 364.

145. See Hay, *supra* note 124, at 503 (discussing principal-agent problems); Tollin & Feman, *supra* note 124, at 536 (proposing auditing and surveillance of outside counsel and litigating defense costs to dissuade future excessive costs).

146. POSNER, *supra* note 128, at 625.

147. See Moorehouse et al., *supra* note 114, at 691. One commentator noted: "Contingent



Likewise contingency fees allow clients to pool their risk with attorneys. The flip side of this pooling of risk is that attorneys are placed in a better position to assess the risks and potential recovery of a claim. Accordingly, the contingent fee award regulates the number of meritless claims that are brought.<sup>148</sup>

#### F. Ethical Issues Addressed by the Market for Legal Claims

Some commentators have posited that contingent fee agreements create ethical problems because of the relationship between the attorney and his lay client.<sup>149</sup> Some ethicists contend that a "client's voluntary agreement alone should not suffice to establish the reasonableness of [a contingent fee agreement]."<sup>150</sup> They argue that a reasonable fee, regardless of any agreement, is one that awards the attorney the market value of time and effort expended.<sup>151</sup> These arguments, however, ignore the prevalence of contingent fee agreements in other, presumably

fees improve risk sharing between client and attorney under the likely condition that the attorney faces less risk arising from a case than does the client." *Id.* Furthermore:

The attorney has a portfolio of cases at any one time. Therefore, her earnings are not determined by a single case. For every case in which she collects a low or zero contingent fees, the attorney may collect an unusually attractive fee. In short, case diversification reduces the risk an attorney faces. By contrast, a litigant may be involved in only one major civil case in a lifetime. The outcome of the case can significantly affect the client's wealth.

*Id.* at 691 n.138. Additionally,

by giving an attorney a stake in the outcome of a case, contingent fees partially solve the principal-agent monitoring problem faced by clients. In particular, most clients simply do not have the information or experience by which to determine whether they are receiving the quantity and quality of legal service that is in their best interest.

*Id.* at 691.

148. See Drummonds, *supra* note 23, at 864-65.

149. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29, 32 (1989) (making the alarmingly sweeping and poorly supported claim that "many contingent fees are invalid as a matter of ethics, policy, and law since they are often used in situations where there is either no contingency or, although a contingency exists, the contingent fee far exceeds any legitimate risk premium for the anticipated effort").

150. Drummonds, *supra* note 23, at 868. One commentator noted, "Most prospective personal injury or other tort plaintiffs lack the information necessary to make the 'free market model' an efficient and fair mechanism in the legal marketplace, even under a 'law and economics' theory. Moreover, such lack of information creates a dilemma in the theory of legal ethics." *Id.* at 869. Another commentator observed that "the institutional conditions necessary to a competitive market do not yet exist in the legal services context." Lester Brickman, *A Massachusetts Debacle: Gagnon v. Shoblom*, 12 CARDOZO L. REV. 1417, 1430 (1991); see also *Udall v. Littell*, 366 F.2d 668, 676 (D.C. Cir. 1966) (noting that "the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing in an area in which he is expert and the client must necessarily rely on the attorney").

151. See Berger, *supra* note 3, at 283.

ethical, professions.<sup>152</sup> Accountants, real estate agents and architects, to name just a few, are all professions utilizing contingent fee agreements with lay clientele.<sup>153</sup> Contingent fee agreements in these fora also involve a professional with expertise regarding the work requested and a client with none, but they do not require a judicial apparatus to police these agreements. As the case with contingent fees for lawyers, a market for services exists in each of these professions.<sup>154</sup>

Some scholars and judges contend that a losing defendant should not “pay for” other cases that the plaintiff’s attorney has lost against other

152. Justice Blackmun remarked:

In enacting fee-shifting statutes, Congress stressed that the fee awarded must be ‘adequate to attract competent counsel, but . . . not produce windfalls to attorneys.’ Today, a plurality of the Court ignores the fact 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.

*Pennsylvania v. Delaware Valley Citizens’ Council*, 483 U.S. 711, 735 (1987) (Blackmun, J., dissenting) (citations omitted).

153. In addition, contrary to the arguments of tort reformers, who contend that the prevalence of the “uniform” 33-40% contingent fee contract signals an absence of a market, the uniformity of the fee—even a nonpercentage contingency fee—still creates a market for claims. See Parker, *supra* note 117, at 1374-76. The uniformity of the fee at 33-40%, if anything, comports with the requirement that the contingent fee be reasonable. The Model Codes Disciplinary Rule 2-106(A) provides that a lawyer shall not “enter into an agreement for . . . [a] clearly excessive fee.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1992). The market may exist regardless of the uniformity of the percentage of the contingent fee charged. See Painter, *supra* note 104, at 655-56 (discussing the market for claims based on variables besides price). “[T]he mere fact that lawyers dominate the market for legal services or champerty of litigation does not necessarily make pricing anticompetitive.” *Id.* at 656. “If lawyers compete against each other, they may drive prices down to competitive levels.” *Id.*; see also Herbert M. Kritzer, *Rhetoric and Reality . . . Uses and Abuses . . . Contingencies and Certainties: The Political Economy of the American Contingent Fee*, WISC. INST. FOR LEGAL STUD. (1995) (disputing the fact that plaintiffs’ lawyers are overpaid).

154. One commentator stated:

[A]n attorney advising a prospective client about the most suitable fee agreement for the client’s particular case obviously may have an economic interest adverse to the client. Short of requiring consultation with independent counsel as to the appropriateness of a proposed [contingent fee agreement] in every case, there is no practical alternative to permitting and requiring the attorney proposing or offering the [contingent fee agreement] to advise the client, notwithstanding the possibility of a de facto conflict in economic interest.

Drummonds, *supra* note 23, at 870. Furthermore:

Requiring clients to consult with Attorney B before signing a [contingent fee agreement] with Attorney A would be one alternative guaranteeing economically disinterested advice to the client about the [contingent fee agreement]. This would appear impractical, however, because clients would then have to pay the attorneys advising on the [contingent fee agreement]. Further, such a prophylactic rule would impose new administrative costs on the tort system.

*Id.* at 870 n.52.

defendants.<sup>155</sup> This argument has no validity under either economics or ethics principles.<sup>156</sup> To assert that losing defendants are paying for the plaintiff's attorney to bring losing claims is to claim that there is no market for attorney's fees. Even in a deficiently functioning market for legal claims some would find recovery and others would not. These nonrecoverable claims, however, do not make the market "unethical" or "ethically invalid." The very fact that there is a functioning market means that there will be claims that do not produce a recovery. The function of the market is to separate and price the various value of these claims. To assert that this means losing defendants are paying for frivolous claims, however, is disingenuous at best.<sup>157</sup>

Furthermore, the client may negotiate with a number of attorneys and consider a number of fee offers before settling on one. In the marketplace, in the process of considering other fee agreement offers from various attorneys, it is almost inevitable that unsuitable offers will be quickly weeded out by competition. As part of that competition, the prospective client will receive advice regarding the unattractiveness of other, unsuitable offers. It is not true, therefore, that "only the lawyer taking the case—who frequently will have a potential economic conflict of interest—can realistically advise the client on the most appropriate fee arrangement in the circumstances of the case."<sup>158</sup> Nothing prevents

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155. "The argument that 'pooling' the risks in client cases is standard practice and thus reasonable, however, suffers from several deficiencies." *Id.* at 873. "A license to practice law does not justify, in effect, taking more of a client's recovery than the particular case justifies and diverting that money to the cases of other clients whose claims are less worthy." *Id.* at 874. The Supreme Court noted: "An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not." *City of Burlington v. Dague*, 505 U.S. 557, 565 (1992).

156. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994). "It is ethical to charge a contingent fee as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements." *Id.* at 1. "It is not necessarily unethical to charge a contingent fee when liability is clear and some recovery is anticipated. A lawyer compensated on a contingent basis has no obligation to solicit on behalf of the client an early settlement offer." *Id.* at 15. The American Bar Association confirms that there are two ways to value the lawyers' services: One is according to the market that pays him according to his time; the other is according to the value he brings to the claim. See *id.*

157. Justice Blackmun noted:

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

*Dague*, 505 U.S. at 574 (Blackmun, J., dissenting) (emphasis in original).

158. Drummonds, *supra* note 23, at 870.

the client from receiving advice from competitors regarding their fee offers and arrangements, and this advice is encouraged by the market.

Attorneys and clients with claims negotiate and the client shops for the attorney with which he is most comfortable. Both attorney and client have an incentive to maximize the value of the claim. Risk is factored into the price. Sometimes, however, the attorney and client may not assess a claim accurately. The claim may not produce a recovery. In order to survive in the market, the attorney has to ensure that he has more winning claims, or more valuable winning claims, than he does losing claims. The fact that part of his income arises from winning claims and that he does not get paid for losing claims cannot be reasonably construed to mean that the winning claims pay for the losing claims. Rather, the losing claims and the winning claims are a function of the market.

#### IV. PROPOSALS

Because the lodestar no longer accurately gauges the types of fee structures that the market has produced, it is no longer able to accurately award attorney's fees. The lodestar never could answer the question it was supposed to answer: "What is a reasonable attorney's fee?" As a result, courts were sent groping for answers, looking for some set of principles to guide them in ascertaining and awarding a reasonable fee. The courts searched in vain for an objective standard for awarding attorney's fees and valuing attorney work product. The Supreme Court adopted a time/rate calculation and a discretionary adjustment based on the factors articulated in the Model Rules of Disciplinary Procedure. Although this provided the courts with a start, the lodestar procedure itself was cumbersome, and scholars did not hesitate to note the burden it placed on the courts. The by-product of the use of the Disciplinary Rules was the incorporation of ethical standards into what was supposed to be an evaluative undertaking.

The most significant problem with the lodestar, however, was that it could no longer accurately gauge the types of fee structures that the market was producing, and, as a result it was no longer able to accurately award attorney's fees. "Reasonable" attorney's fees are those that an attorney can recover on the market for such fees, and the market for fees was changing significantly. As the legal market has changed over the past two decades, attorneys, firms and their clients have made dramatic innovations in the way they contract for fees. In addition to hourly fees, attorneys and clients contract to handle cases based on set fees for a certain volume of cases, mixed contingent and

hourly fees, and simple contingency fee agreements.<sup>159</sup> Today lawyers and their clients contract for fees in many innovative and creative ways, and these innovations serve not only to provide needed flexibility to the contracting parties, they provide an economic benefit and improve the services clients can request and receive from the legal profession.

The lodestar's focus solely on hourly rates is not only limited, it is outdated and inaccurate. In *City of Burlington v. Dague*, the lower courts sought to address the changing market and the prevalence of contingent claims by introducing an "enhancement," but the Supreme Court imprudently dismissed the addition. The justification for refusing contingency enhancements was not economic, but vaguely based on attorneys' ethics. Now, in addition to the perennial criticisms heaped on the lodestar—it is burdening the courts with unnecessary procedures and considerations—the lodestar fails in its most important and vital function: the valuation of attorney work product.

It is time for the lodestar to recognize and consider the contingent fee arrangement at last. In this way, the court may take into consideration not only the theoretical "reasonableness" of attorney's fees, the court may view and consider the fee arrangement in effect in the very case before it. The court may at last utilize the product of the market for claims that, in the end, provides an objective valuation of the attorney's work product based on the merits of the client's underlying claim. Finally, where courts already engage in a *de facto* contingent fee analysis, the use of the contingent fee can become honest and open, where ethical concerns can be addressed as real ethical concerns, not attorneys shame in awarding themselves fees.

#### A. Consider Both Hourly and Contingency Fees for Attorneys

Under this proposal, a court would examine attorney's fees according to their value on the market, and would consider both contingent fee markets and hourly fee markets. The court would not be limited in its

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159. As one commentator cautioned:

However, the time/rate computation element must be put into perspective. It is designed only as a starting point. There are several uncertainties and ambiguities inherent in the time/rate formula, making neither a stable measure nor an easily applied one. In the first place, the notion that there are fixed hourly rates that can be attributed to all lawyers and used as objective markers of the worth of their services is somewhat of an illusion. These rates have never existed for contingent fee lawyers, since time and hourly rates are irrelevant for their type of practice. And the rates that supposedly exist in corporate practice are not fixed but frequently change in response to various considerations.

7B WRIGHT ET AL., *supra* note 114, §1803.

lodestar analysis to the hourly market for attorney's fees. The court considers not only the hourly rate for attorneys, but the value of the claim as a property claim bearing a contingency fee. Many federal district courts already consider what the contingent fee award would be as a matter of practice.<sup>160</sup> The court determines which claims were successful on the basis of which claims were awarded a recovery.

There are some benefits to considering both the contingent fee arrangement with an hourly fee arrangement. Consideration of a reasonable contingent fee arrangement may provide the court with a more representative view of the market for claims. In turn, the court may be more able to accurately value the attorney's work product on the case because the court would in effect have two separate indications of value. Therefore, regardless of whether the attorney takes the case on a contingent or an hourly fee or some combination, in a legal environment where various arrangements are available to clients, they may be made available for consideration by the trial court.

In essence, however, the additional consideration of the contingent fee does little to ease the lodestar burden currently weighing on the courts. In addition to the time/rate calculation, the court must proceed to consider what would be a reasonable contingency. In cases where the client entered into an hourly fee with the attorney for the prosecution of the suit, consideration of a comparable contingent fee may have little relevance. More important, it replicates many of the lodestar's evaluative problems because the court has to formulate a market for the case as a contingency fee case when it was prosecuted as an hourly fee case. Instead of consulting the real market that produced the fee arrangement between client and counsel, the court has to provide one itself.

### *B. Consider Either Hourly or Contingency Fees for Attorneys*

The court examines attorney's fees according to their value on the market. If the claim before the court was prosecuted on an hourly fee, the court examines the market for hourly fees. If the claim before the court was prosecuted on a contingent fee, the court considers the market for contingent fees. The free market of claims and negotiated fees will provide the proper standard.

The value in considering the actual fee arrangement entered in determining reasonable attorney's fees in a case may seem self-evident.

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160. See *supra* notes 79-87 and accompanying text (discussing problems with the lodestar method, especially in its application during litigation over attorney's fees).

But this does not seem to be self-evident to the courts. By considering a contingent fee arrangement in a contingency case and an hourly fee in an hourly fee case, the court can dispense with time wasted proceeding with theoretical fee arrangements that were not utilized and never existed in the pending case. The court no longer has to construct theoretical markets for “reasonable” fees because the market for claims has produced what is presumed to be a reasonable fee already. In addition, by considering the contingent or the hourly fee arrangement, the court may more properly represent the market for attorney work product, claims and attorney’s fees in today’s legal profession. The courts should encourage and assist attorneys addressing the needs of their clients with flexible arrangements that do not fit the typical hourly fee arrangement model.

A critique of the use of the actual fee arrangement would likely be based on ethical issues, not economics. In fact, it may be asserted that the fee arrangement before the court was not reasonable, or circumstances may justify a court’s disregarding a fee arrangement. Such ethical concerns, however, are not particular to contingent fee arrangements, and the ethical duties of attorneys are the same under either fee arrangement. As the case with hourly fee arrangements, ethical concerns under a contingent fee arrangement should be addressed under applicable ethical principles and law. Further, if the court determines that the fee arrangement involved the attorney’s taking advantage of a client, then recourse can be had not only through ethics procedures, but also under substantive contracts law. The fee arrangement between the attorney and the client is, in the end, a contract, and recourse should be had under the law of contracts. The law of contracts provides both settled and tested defenses, remedies and procedures that govern contracts like that between the attorney and client.

### *C. The Reasonableness Standard*

The “reasonableness” standard should only be resorted to in cases of unconscionability, duress or similar extraordinary circumstances. It should not be used as a “gatekeeper” governing standard. The free market of claims and negotiated fees will provide the proper standard. As in all other claims, the court should interfere only if the claim is clearly unconscionable or requires otherwise extraordinary action. contracts law allows this in situations of fraud, duress and acts of God.

## V. CONCLUSION

In determining reasonable attorney's fees, the courts should do what is most economically reasonable, and allocate attorney's fees after considering the fee arrangement in effect between the attorney and client before the court.<sup>161</sup> For too long courts have either clung to pseudo-ethical limitations on attorney's fees (when the question is not one of ethics) or have repeatedly relied on the lodestar method's ability to determine a reasonable fee. In *City of Burlington v. Dague*, Justice Scalia clings to the lodestar and the strong presumption that it determines reasonable fees. Such a presumption, however, only re-asks the question, "what is a reasonable fee?" It is time for a change, a simple reformulation of the lodestar. As courts clamor for an objective standard in valuing attorney work product and attorney's fee claims, the response should come from an economics analysis. A reasonable fee should be the attorney's fee that is recoverable on the market for legal claims. The market for claims seeks to ensure the most efficient allocation of judicial resources to the client at the lowest price. The market for claims provides an actual and objective standard by which the court can ascertain the value of the attorney's work product, and apportion an appropriate fee accordingly.

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161. It should be noted, however, that either of the above proposals better addresses the question facing courts than does the present lodestar formulation.