Fee-Shifting Statutes and Compensation for Risk

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Abstract

A law firm that enters into a contingency arrangement provides the client with more than just its attorneys' labor. It also provides a form of financing, because the firm will be paid (if at all) only after the litigation ends; and insurance, because if the litigation results in a low recovery (or no recovery at all), the firm will absorb the direct and indirect costs of the litigation. Courts and markets routinely pay for these types of risk-bearing services through a range of mechanisms, including state fee-shifting statutes, contingent percentage fees, common-fund awards, alternative fee arrangements, and third-party litigation funding.

This Article mines those risk-compensation mechanisms for lessons about the proper interpretation of federal fee-shifting statutes. Those statutes encourage private plaintiffs to enforce a limited set of laws, including civil rights statutes, by authorizing the court to award a reasonable attorney's fee to the prevailing party. Although a law firm cannot receive a court-ordered fee shift unless its client prevails, current doctrine prohibits compensation for risk in federal fee-shifting awards. The Article argues that this prohibition should be eliminated, and to that end, it proposes a method of including compensation for risk in federal fee-shifting awards.

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INTRODUCTION

In the United States, each party to a civil lawsuit must generally pay for its own representation, regardless of who ultimately wins or loses. To encourage the enforcement of laws deemed to promote the public interest, such as civil-rights statutes, Congress has enacted fee-shifting provisions that create a set of exceptions to this default rule.[1] When a

[1] *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790-91 (2011); *see also* Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465 (2014). "Every significant contemporary civil rights statute contains some provision for attorney's fees." Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205.

plaintiff is the "prevailing party" in an action to enforce one of the laws specified in a fee-shifting statute, the court may order the defendant to pay the plaintiff "a reasonable attorney's fee."[2]

Statutory fee-shifting awards are meant to reflect the market value of the legal services provided to the plaintiff,[3] such that claimants can rely on the potential fee award to obtain representation.[4] Federal courts calculate these awards by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation, a product known as the lodestar. Although these fee shifts are contingent upon success, the hourly rates are based on the amount a law firm could reasonably have charged under standard (i.e. non-contingent) hourly billing.[5] In its 1992 decision in *City of Burlington v. Dague*, the Supreme Court held that courts may not increase fee-shifting awards to reflect the law firm's contingent risk of nonpayment.[6] More than twenty-five years later, that prohibition on contingency enhancement still applies.[7]

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[2] Some statutory and contractual provisions authorize fee shifting for the benefit of the defendant, or for the benefit of either party. *See, e.g.,* Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (holding that the Copyright Act authorizes two-way fee shifting at the district court's discretion). This Article focuses instead on federal fee-shifting statutes that authorize an essentially one-way fee shift in favor of the plaintiff. *See* Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412 (1978). Under these statutes, a defendant cannot generally receive fees unless the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Id.* at 421.

[3] *See, e.g.,* Missouri v. Jenkins by Agyei, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded under [42 U.S.C. § 1988] are to be based on market rates for the services rendered.").

[4] For example, a fee-shifting provision enacted in 1976 applies in constitutional tort litigation and several other types of civil rights cases. It provides that "[i]n any action or proceeding to enforce" the specified provisions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988.

[5] This Article focuses on the compensation a law firm (including a solo practice) should receive for representing a particular client. It does not discuss the distinct question of how much compensation a particular attorney should receive from her employer or practice. Although an individual's salary or income may be affected by the compensation her law firm receives for a particular case, it may also depend on a host of factors—like organizational structure, unionization, pension obligations, etc.—that would serve to muddle rather than to illuminate the analysis I undertake here.

[6] 505 U.S. 557 (1992).

[7] *See infra* Part II.D. Under many *state* fee-shifting statutes, however, contingency enhancement remains available. *See infra* Part III.A.

To understand the impact of this prohibition, consider *District of Columbia v. Heller*.[8] In that case, the Supreme Court ultimately held by a one-vote margin that the Second Amendment protected the plaintiff's right to keep a handgun in his home.[9] At the time the case was filed, that constitutional right had not been judicially recognized,[10] and it had been several decades since the Supreme Court had issued *any* decision interpreting the Second Amendment.[11] NRA leadership initially tried to prevent the case from being filed, because they questioned whether a majority of the Supreme Court would rule in the plaintiff's favor.[12] In short, *Heller* was a high-risk case. Because of *Dague*, however, the fee-shifting award could not exceed the amount the plaintiff's counsel would have received if the outcome had been certain from the start.[13] A similar story could be told about any number of landmark cases in which success initially appeared uncertain.[14]

Litigation risk is present in run-of-the-mill cases as well. As the Court recognized in *Dague* itself, "no claim has a 100% chance of

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[8] 554 U.S. 570 (2008).

[9] *Id.* at 635.

[10] *See id.* at 570 (asserting that the question "has been for so long judicially unresolved" because "[f]or most of our history the question did not present itself").

[11] *See* United States v. Miller, 307 U.S. 174 (1939).

[12] *See* Adam Liptak, *Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES (Dec. 3, 2007), *available at* https://www.nytimes.com/2007/12/03/us/03bar.html.

[13] Heller v. D.C., 832 F. Supp. 2d 32 (D.D.C. 2011) (awarding fees based on a reasonable number of hours multiplied by a reasonable non-contingent hourly rate). The plaintiffs' attorneys in *Heller* sought a contingency enhancement, notwithstanding their recognition that the argument was foreclosed by *Dague*:

> No lawyer rationally undertakes, on a contingent basis, work that would yield the same fee for the same work that could be earned without risk of non-payment. Section 1988 commands that counsel be paid a "reasonable" fee, and it is patently unreasonable to assign lawyers' work zero premium for the risk of non-payment in cases with substantial such risk.

Memorandum of Points and Authorities in Support of Plaintiff's Motion for Attorney Fees and Costs, Case 1:03-cv-00213-EGS, Doc. 42, at 26 n.10 (Aug. 25, 2008), *available at* http://www.scotusblog.com/wp-content/uploads/2008/08/heller-fee-memo-8-25-08.pdf.

[14] For example, *Hollingsworth v. Perry*, 570 U.S. 693 (2013), ultimately enabled same-sex couples to marry in California. Due to their views of its riskiness, however, major LGBT advocacy groups believed at the time that it should not have been filed. *See* Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CAL. LAWYER (Jan. 2010).

success."[15] Accordingly, an attorney does not typically tell a client that she *will* prevail in her lawsuit, but rather advises her as to whether she is *likely* to prevail.[16] Because of this ubiquitous risk, and because "[a]n hourly rate that is payable only when one wins is worth less than the same hourly rate that is guaranteed,"[17] claimants currently face a structural impediment to securing representation in civil rights litigation and other fee-shifting cases.[18] As the Third Circuit once put it, "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."[19] Because of *Dague*, however, many civil rights plaintiffs can offer nothing more.[20]

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[15] City of Burlington v. Dague, 505 U.S. 557, 563 (1992). Even if a claim were to have a 100% chance of success, it would not have a 100% chance of resulting in a fee-shifting award: Depending on how the recovery came about, the court might not consider the plaintiff to be a "prevailing party." *See infra* Part I.A.

[16] *See* Mark K. Osbeck, *Lawyer As Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN ST. L. REV. 41, 43 (2018); *see also* Model Code of Prof'l Resp. EC 7-5 ("A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would *likely* be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.") (emphasis added).

[17] Charles Silver, *Regulation of Fee Awards in the Fifth Circuit*, 67 THE ADVOC. (TEXAS) 36, 36 (2014).

[18] *See id.* at 37 ("[T]he Supreme Court prohibited contingency enhancements in *City of Burlington v. Dague*, thereby assuring that plaintiffs who have only fee awards to offer cannot use the market for legal services effectively."); *see also* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 678 (2013) ("A for-profit sector attorney weighing only economic considerations will not represent plaintiffs on the expectation of a fee award if she also has the opportunity to be paid at a comparable rate, in a timely fashion, and not contingent on prevailing."); Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 229 (1997) ("In the area of civil rights class actions, attorneys for plaintiffs described *Dague* as the major factor limiting their practice.").

[19] Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973) (quoting Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963)); *see also* Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DEPAUL L. REV. 587, 595 (2014) ("If contingent fee counsel were merely reimbursed at market rates, few would undertake such work because they could get paid market rates in noncontingent fee cases without such risk.").

[20] Although the Court has prohibited risk enhancements, it has authorized other upward adjustments to the lodestar, such as for delays in payment, *see Jenkins*, 491 U.S. at 283-84, and for extraordinary performance by counsel, *see Perdue v. Kenny A.*,

A plaintiff who has already suffered a very large amount of damages will often be able to hire counsel on the basis of a contracted-for contingent percentage fee,[21] regardless of whether a fee-shifting statute applies.[22] A plaintiff who seeks an injunction to prevent those damages from accruing or increasing, however, will not have that option. Structurally inadequate fee-shifting awards thus raise particularly significant obstacles for plaintiffs who want to sue to prevent harm—to halt enforcement of a regulation *before* it forces them to close their facilities,[23] for example, or to require a city to fix its infrastructure *before* the contaminated water poisons their children.[24]

Stare decisis has special force with respect to decisions that, like *Dague*, involve statutory interpretation. Considerations of stare decisis thus raise the question whether Congress, rather than the courts, must undo *Dague*. Although the decision was wrong from the start,[25] mere

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559 U.S. 542 (2010). Courts may also adjust the lodestar downward for reasons like the extent of the plaintiff's success. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983).

[21] Whether a particular damages amount would qualify as "large" or "small" may look very different from the perspective of a law firm deciding whether to take a case (which is the perspective referenced in the text) than from the perspective of the claimant seeking representation. Many law firms would decline to take on a civil rights claim seeking $75,000 in damages, for example, even though that amount might represent more than five years of the claimant's gross income (e.g. if the claimant is working full time at the federal minimum wage of $7.25 per hour). *Cf.* Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 19 n.57 (2008) (reporting that the author's law school clinic was "unable to refer [fee-shifting] cases involving less than $100,000 in damages to the private bar").

[22] *See infra* Part II.A.1.

[23] *Cf.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318, 195 L. Ed. 2d 665 (2016), as revised (June 27, 2016) (involving a challenge to a statute that, if not enjoined, would have led to the closure of several medical facilities).

[24] *Cf.* Michigan Dep't of Envtl. Quality v. City of Flint, 282 F. Supp. 3d 1002, 1018 (E.D. Mich.), reconsideration denied, 296 F. Supp. 3d 842 (E.D. Mich. 2017), and reconsideration dismissed, No. CV 17-12107, 2017 WL 8682365 (E.D. Mich. Nov. 9, 2017) (involving an order to provide safe drinking water to the residents of Flint, Michigan).

[25] The decision immediately drew criticism on economic grounds. *See, e.g.,* Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301, 303 (1993) (arguing that the decision "demonstrate[d] the Justices' inability to handle basic economic issues correctly" and "[could not] be defended on economic grounds"); Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1115 (1993) ("Justice Scalia's economic analysis in *City of Burlington* is unsound"). *Dague* was not the first of the Supreme Court's statutory fee-shifting cases to garner such criticism. *See* Thomas D. Rowe, Jr., *The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics, and Ex Ante Analysis*, 1

incorrectness is not usually enough to overcome stare decisis.[26] Changed circumstances reduce the force of stare decisis, however, and the Supreme Court has specifically recognized that that changes in the legal market are an appropriate basis for modifying case law about fee-shifting statutes.[27] A great deal has changed between 1992 and the present, both in the market for legal services, and in the profession's understanding of that market. As this Article will demonstrate, those subsequent developments have made the Court's errors in *Dague* more readily apparent.

The Supreme Court should acknowledge both those subsequent developments and its original errors by overruling *Dague*. In light of the information now available, the difficult question is not *whether* statutory fee-shifting awards should include compensation for risk, but *how* they should do so. Courts would surely balk at replacing structurally inadequate fee-shifting awards with structurally exorbitant ones. This Article thus takes up both the *whether* and the *how* questions.

In addressing those questions, the Article draws on the current state of knowledge about legal markets and compensation for risk. Consider, for example, private-market contingency fees. At the time of the Court's decision in *Dague*, there was a "dearth of systematic information on contingency fee legal practice."[28] The situation has since improved immensely: Since the mid-1990s, research by Herbert Kritzer and other scholars has yielded valuable information about the logistics and nature of contingent-fee representation.[29] As this empirical

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GEO. J. LEGAL ETHICS 621, 638-39 (1988) (criticizing the "inconsistent and unsophisticated Supreme Court uses of economic approaches" in fee-shifting cases decided during the 1985 and 1986 Terms).

[26] Justice Thomas recently argued that "[i]f a prior decision demonstrably erred in interpreting such a law, federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error." Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring). That view, however, is an outlier.

[27] *See* Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 556 (2010).

[28] Herbert M. Kritzer, *The Wisconsin Contingency Fee Study*, 81 JUDICATURE 26 (1997).

[29] *See, e.g.,* Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971 (2017); Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337 (2011) [hereinafter *Possible but Not Certain*]; Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest–It's Even More True Now*, 51 N.Y.L.S. L. Rev. 285 (2006) [hereinafter *Texas Plaintiffs' Practice*]; HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004)

and theoretical work has shown, a law firm that enters into a contingent-fee arrangement provides the client with more than just its attorneys' labor.[30] It also provides a form of financing, because the firm will be paid (if at all) only after the litigation ends; and insurance, because if the litigation results in a low recovery (or no recovery at all), the firm will absorb both the direct and the indirect costs of the litigation.[31] The rates that law firms charge their contingent-fee clients include the monetary value of the risk-bearing services they provide.[32]

In addition to contingent percentage fees, this Article examines state fee-shifting statutes,[33] common-fund awards to class counsel,[34] the "alternative fee arrangements" that for-profit law firms offer their clients,[35] and nonrecourse, case-specific loans made by third-party litigation funders.[36] Each of those contexts involves a mechanism for compensating risk-bearing services associated with litigation. The Article draws on the lessons of those contexts to evaluate options for incorporating compensation for risk into federal statutory fee-shifting awards.[37]

Under the approach I propose here, courts would apply a set of discrete, case-specific risk multipliers to the lodestar.[38] The proposal

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[hereinafter REPUTATIONS AND REWARDS]; Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 INT'L J. LEGAL PROF. 345 (1999); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 309 (1998) [hereinafter *Wages of Risk*].

30 Although contingent-fee research has provided a richer empirical and theoretical basis for understanding this aspect of contingent-fee practice, the basic insight has been around for much longer. *See, e.g.,* John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981) ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.").

31 Kritzer, *Wages of Risk*, *supra* note 29, at 270.

32 *See infra* Part III.B.

33 *See infra* Part III.A.

34 *See infra* Part III.C.

35 *See infra* Part III.D.

36 *See infra* Part III.E.

37 *See infra* Part IV.

38 *See infra* Part IV.B.

addresses several of the concerns raised in *Dague* and elsewhere. For example, to mitigate administrability concerns, it would require a court to choose which of only four options best represents the degree of risk presented by a particular case.[39] To mitigate concerns about creating undue incentives to bring high-risk cases, the expected value of the fee would scale up with the case's probability of success.[40] The proposed approach would be under-compensatory in some circumstances, but it would significantly improve upon the status quo, which is under-compensatory in nearly all circumstances.[41]

To be sure, the prohibition on compensation for risk is not the only obstacle to an effective fee-shifting regime. Because of the way the Supreme Court has interpreted the "prevailing party" requirement, a defendant might entirely avoid fee eligibility even if the plaintiff receives all of the relief that she requested.[42] Fee-shifting awards under some statutes exclude expert witness fees,[43] even though experts can be both expensive and necessary to a plaintiff's success. Courts may deny fees when a plaintiff recovers only nominal damages,[44] even though no other relief is available for some constitutional violations.[45] The list could go on and on.[46] Statutory fee shifting has been suffering death by a thousand cuts. The need for many bandages, however, makes a poor justification for applying none.

I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT RISK

Litigation can take multiple paths that could end in a law firm going uncompensated (or undercompensated) for the services it has provided to a client. This Part analyzes some of those paths and

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[39] *See infra* Part IV.B.3.

[40] *See infra* Part IV.B.4.

[41] *See infra* Part II.D.

[42] *See infra* Part I.A.

[43] *See* Davies, *supra* note 18, at 263 (discussing the extent and impact of prohibitions on the reimbursement of expert witness fees).

[44] Farrar v. Hobby, 506 U.S. 103 (1992); *see also* Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829 (2016) (discussing lower-court interpretations of *Farrar*).

[45] *See* Carey v. Piphus, 435 U.S. 247 (1978).

[46] It could also reach back decades. In 1985, for example, several members of a task force "expressed the view that fee awards in recent years in the social action context have been so discouraging that few attorneys will accept a civil rights case." Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 249 (1986).

clarifies which ones are included in this Article's discussion of compensation for risk. As explained below, some of the risks a firm assumes in statutory fee-shifting cases do not plausibly warrant independent compensation, and others seem all but impossible to compensate adequately. It is the remaining category of contingent risk on which this Article focuses.

In addressing the role of risk in rate-setting and case-selection decisions, the following discussion does not assume that a law firm will charge its clients a line-item cost for risk-bearing services. Rather, it assumes that a for-profit firm will generally charge the highest rates (on an hourly, percentage, or other basis) that the market will bear and the law will allow. In addition to determining that rate, however, a law firm must determine whether the rate will yield an adequate return on its investment if it takes on a particular case. The risk of nonpayment (or underpayment) factors into that analysis.[47]

A. *Risks Specific to Fee Shifting*

Some potential causes of nonpayment are specific to statutory fee-shifting cases, such that one would not expect a law firm's standard hourly rates (i.e. those charged to paying clients) to reflect them. The Supreme Court has often failed to recognize the existence of this category of risk, instead equating a law firm's risk of nonpayment with the strength of the plaintiff's claim. For example, the Court wrote in 1987 that "the risk of not being paid" in a statutory fee-shifting case "is measured by the risk of losing rather than winning."[48]

Contrary to the Court's assertion, some risks of nonpayment may be *inversely* proportional to the strength of the plaintiff's claim.[49] For example, a defendant facing a strong claim might offer to provide all of

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[47] This discussion focuses on for-profit representation, but even in the context of nonprofit and pro bono work, risk plays a role in case selection by affecting the firm's analysis of whether a matter's expected benefits are worth its expected costs.

[48] Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 715–16 (1987); *see also* City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (asserting that "the attorney's contingent risk" is "the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits"). *But see* Blum v. Stenson, 465 U.S. 886, 901 n.17 (1984) (referring to "the risk of not being the prevailing party . . . and therefore not being entitled to an award of attorney's fees from one's adversary").

[49] *See* Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1462 (2007) (explaining how fee-shifting rules can "deprive[] plaintiffs' counsel of fees if she wins too easily").

the requested relief, but only in exchange for the plaintiff's agreement to waive her entitlement to fees. If the plaintiff accepts this type of "sacrifice offer"[50] (or, in a class action, if class counsel accepts it on the plaintiffs' behalf), the court must usually enforce the resulting agreement, including the fee waiver.[51]

Alternatively, in a case seeking only injunctive relief, a defendant who sees the writing on the wall might unilaterally cease to engage in the challenged conduct before a court can order it to do so. If the defendant engages in this type of "strategic capitulation,"[52] the court must usually dismiss the case as moot,[53] and the plaintiff will not

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[50] *See* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 241 (2003).

[51] *See* Evans v. Jeff D., 475 U.S. 717, 731-32 (1986); *see also* Reingold, *supra* note 21 (describing the impact of *Evans v. Jeff D.* on private attorneys' willingness to accept fee-shifting cases). In cases seeking a large amount of monetary damages, a law firm can hedge against this result through a retainer agreement that specifies a contingent percentage fee as an alternative form of compensation. *See infra* Part II.A.2 (discussing such fee arrangements). Otherwise, if the case is not a class action, a law firm might attempt to obtain some protection by seeking the client's agreement not to waive fees. *See* Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST 183, 190-91 (Robert Granfield & Lynn Mather eds. 2009). Some bar associations, however, deem such agreements to be unethical. *See, e.g.,* District of Columbia Bar, Ethics Opinion 289 ("A client's right to accept or reject a settlement offer cannot be contracted away in advance through a provision in a retainer agreement that precludes the client from accepting any settlement that waives the client's right to recover attorneys' fees . . . ."). Even if deemed ethical, such agreements might "at best give the lawyer a contractual right against his client." *See* Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion 1987-4 (1987).

[52] *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091 (2007).

[53] Under some circumstances, an exception to mootness may apply. For example, a defendant's voluntary cessation of challenged conduct does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). *But see* Michael Ashton, Note, *Recovering Attorneys' Fees with the Voluntary Cessation Exception to Mootness Doctrine After* Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 965, 969 (2002) (examining the barriers to applying this exception to government defendants).

qualify as a "prevailing party."[54] In either of these scenarios, the court must usually deny any request for a statutory fee-shifting award.[55]

It is difficult to see how courts could realistically award sufficient compensation to account for the possibility of a sacrifice offer or strategic capitulation. To see why, imagine that your firm has been approached about representing a plaintiff in a statutory fee-shifting case. Imagine further that if the court does award fees, the amount will be $X + $Y, where $X is the amount you would demand for any other type of case taken on contingency and $Y is the additional amount you would demand because of risks specific to statutory fee shifting.[56] Even if you achieve an overwhelmingly successful result after years of hard-fought litigation,[57] there is a real chance that your firm will receive no compensation at all for its work on the case. With that in mind, how high would $Y have to be in order for your firm to accept the representation?

For purposes of this Article, I assume that that amount would be higher than a court would be willing to award, and that this obstacle to representation should instead be addressed through changes to the fee

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[54] Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 605 (2001); *see also* Albiston & Nielsen, *supra* note 52 (describing the impact of *Buckhannon* on public interest litigation); Karlan, *supra* note 1, at 205–08 (criticizing the Supreme Court's reasoning in *Buckhannon*).

[55] Some caveats apply. Because the *Buckhannon* restriction is based on the meaning of the term "prevailing party," it does not apply to statutes that use different standards for fee eligibility. *See, e.g.,* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 244 (2010) (discussing a statute making fee awards available "to either party" at the court's "discretion"); Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 307 F.3d 1318, 1326 (11th Cir. 2002) (discussing a statute making fee awards available "to any party, whenever the court determines such award is appropriate"). Moreover, even if a court would deny a request for a statutory fee-shifting award, the parties could agree to the payment of attorney's fees as part of their settlement. (The court's anticipated ruling on a fee-shifting petition, however, would affect the parties' settlement negotiations. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (discussing the impact of judges' "rulings in adjudicated cases and their anticipated response to the case at hand" on "the respective bargaining endowments that parties bring to their settlement negotiations").)

[56] This hypothetical is meant as a thought experiment, rather than a suggestion that firms in fact set their rates in this manner. *See supra* note 47 and accompanying text.

[57] The settlement that waived entitlement to fees in *Evans v. Jeff D.*, for example, was offered after the litigation had been pending for more than two and a half years. *See* Evans v. Jeff D., 475 U.S. 717, 721-22 (1986) (noting that the complaint was filed in August 1980 and the settlement offer was made in March 1983).

eligibility standard.[58] Accordingly, except where specifically noted, the discussion that follows will not address compensation for the risks of nonpayment that are specific to the representation of plaintiffs in statutory fee-shifting cases.

B. *More General Types of Risk*

Like other service providers, when a law firm provides services in anticipation of payment, it generally faces the risk that the client (or other obligor) will not pay the bill. Presumably, law firms set their rates with this possibility in mind. Accordingly, even if a firm charges its clients through standard (i.e. non-contingent) hourly billing, one would expect its standard rates to reflect this particular risk.[59] Because a firm's standard hourly rates are already a component of the lodestar, there does not seem to be a viable argument for adjusting fee awards upward to account for this particular type of risk,[60] and the remainder of this Article should be read to exclude it.

Another category of risk, which does not apply to standard hourly billing, affects only those law firms whose compensation depends on their client's success in obtaining relief. It arises from the possibility that the plaintiff will lose the case, in part or in full, such that the law firm will not be compensated for the labor and other resources it has invested in the litigation. It is this contingent risk on which this Article will focus.

This category of contingent risk turns largely on the merits of the claims—what the courts will say about the applicable law, what evidence will come out in discovery, how the fact-finder will interpret that

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[58] For arguments in support of such changes, see Reingold, *supra* note 21; Albiston & Nielsen, *supra* note 54.

[59] *See* Jones v. Cent. Soya Co., 748 F.2d 586, 593 (11th Cir. 1984) ("[T]he risk of nonpayment by a client liable for fees . . . is assumed without special compensation by all attorneys in all cases."). Some law firms, however, require some amount of prepayment as a means of mitigating this risk. *See, e.g.*, Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116-18 (2009) (discussing the "security retainer," which "is intended to secure the client's payment of fees for future services that the lawyer is expected to perform").

[60] An exception might be if a law firm usually required payment in advance, such as through the use of a security retainer. *See* Richmond, *supra* note 59, at 116-18. In those circumstances, the firm's standard hourly rates might not reflect this particular risk of nonpayment.

evidence, and so on.[61] That does not mean, however, that "risk" is a synonym for "merit."[62] To the contrary, when a court reaches the point of calculating a fee-shifting award, it has already established that the plaintiff is a "prevailing party" who has obtained court-ordered relief.[63] In that context, to say that a claim was "risky" means only that there were obstacles to the success that the plaintiff ultimately achieved.[64]

Two other potential misconceptions are worth addressing. First, one scholar has argued that there is no apparent justification for subsidizing "risky" cases.[65] The world of litigation, however, does not divide itself into "risky" and "risk-free" claims. To the contrary, all claims—even those that initially seem overwhelmingly likely to succeed—involve some amount of risk.[66] Because of this ubiquitous uncertainty, a "risky" case is just a case, not necessarily a long-shot.[67]

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[61] It can also depend on factors connected to the identity of the adversary—whether this defendant has shown a willingness to engage in scorched-earth litigation tactics, for example, or an unwillingness to settle at any cost.

[62] This recognition of the difference between "risk" and "merit" is itself distinct from the recognition that "meritless" does not mean "valueless." *See* Reinert, *supra* note 64, at 1197 (examining "the many ways in which nonmeritorious, but nonfrivolous cases can contribute to the law").

[63] *See* Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001); *see also supra* notes 4-2 and accompanying text.

[64] *Cf.* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1197 (2014) ("If we cannot determine at filing that a case has a zero chance of success, then the case may be meritless or meritorious . . . .").

[65] *See* Hylton, *supra* note 25, at 1115. *But see* Charles Silver, *Unloading the Lodestar: Toward A New Fee Award Procedure*, 70 TEX. L. REV. 865, 896–97 (1992) (arguing that "the assumption that fee-shifting cases yield substantial external benefits supports the claim that higher levels of risk-taking are more appropriate in such cases than in cases subject to the American Rule").

[66] The Supreme Court once put the point as follows:

> [S]eldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation.

Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 422 (1978).

[67] To the extent that one might ask whether fee awards should be enhanced "in cases in which the probability of a plaintiff victory is low," *id.*, that question goes to *how* rather than *whether* risk-bearing services should be compensated. In particular, it

Second, although some might assume that higher-risk cases generate a higher lodestar value,[68] happenstance plays too great a role in case outcomes for that assumption to hold true. For example, imagine a case in which the viability of one plaintiff's claim is the subject of a circuit split, that plaintiff lives in a circuit where the law currently favors her, and a second plaintiff has filed a petition for certiorari. The greater the likelihood of the Court granting certiorari, the more risk the first plaintiff's case presents, even though the lodestar will reflect only the work performed on her own case. Alternatively, imagine a case in which some of the plaintiff's key witnesses are in poor health. The greater the likelihood of a witness dying before he can testify on the plaintiff's behalf, the more risk the case presents, even though the lodestar will reflect the attorneys' labor rather than the witnesses' health. In scenarios like these, the level of litigation risk bears no direct relationship to the lodestar.

Some sources of risk come from the identities of the trial judge, appellate judges, and jurors. With regard to judges, an attorney might draw on her skill and experience in choosing where to file a complaint,[69] but the assignment of a particular district judge will usually be made at random.[70] Similarly, appellate panels are configured semi-randomly.[71] Different judges will make different decisions based on identical evidence, case law, and arguments,[72] and as the abuse of discretion standard recognizes, some decisions can legitimately go either way. With regard to jurors, trials should occur only when the verdict *cannot* be known in advance,[73] reflecting the reality that "the

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raises the possibility that an upper bound on compensation for risk would be appropriate. For a proposal that includes such an upper bound, see *infra* Part IV.B.

[68] *See infra* notes 137-139 and accompanying text.

[69] The constraints of jurisdiction and venue might not allow such a choice. *See, e.g.*, 28 U.S.C. § 1391 (restricting the venue in which a civil action may be brought).

[70] *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 254 (2016) ("The norm in federal district courts is random assignment among judges within a district.").

[71] *See generally* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 115 (2017).

[72] *See id.* at 115 ("Any litigant will tell you that the composition of a panel matters for the outcome of an appeal. And any scholar of judicial decision making will tell them that they are right.").

[73] *See* Fed. R. Civ. P. 56 (providing for summary judgment in the absence of a genuine dispute of material fact); *see also* Fed. R. Civ. P. 50(a)-(b) (providing for judgment

different 'priors' that different juries bring to bear in evaluating the evidence, rather than differences in the evidence itself, can lead juries to decide identical cases differently."[74] The lodestar does not (and cannot) compensate law firms for taking on these risks.

II. COMPENSATION FOR RISK UNDER FEDERAL FEE-SHIFTING STATUTES

This Part examines the difficulties that courts have faced in determining appropriate compensation for risk under federal fee-shifting statutes. As explained below, federal courts provided such compensation for several years, but the Supreme Court's 1992 decision in *City of Burlington v. Dague* put a stop to the practice.[75] That decision has undermined the ability of civil rights claimants to obtain effective representation.

A. *The Underlying Dilemma*

Questions about the calculation of statutory fee-shifting awards require courts to determine "what Congress meant by a 'reasonable' fee."[76] Accordingly, it is worth examining why Congress has enacted fee-shifting statutes, how claimants and their counsel have used them, and how courts have understood their goals.

1. Market gaps

To understand the purposes of fee-shifting statutes, consider what a world without them would look like. In this hypothetical world, so long as contingent percentage fees remain available, some claimants will be able to rely on contingency agreements to find representation. For example, a stock broker who makes a six-figure salary will probably be able to find effective representation for her sexual harassment claim, because the amount of lost wages at stake will be quite substantial.[77]

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notwithstanding the verdict only if no reasonable jury could have reached the verdict it did on the basis of the evidence presented).

[74] Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Legal Uncertainty*, 8 LEGAL THEORY 297, 299 (2002).

[75] 505 U.S. 557 (1992).

[76] *See* Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 550 (2010) (noting that fee-shifting statutes "do[] does not explain what Congress meant by a 'reasonable' fee, and therefore the task of identifying an appropriate methodology for determining a 'reasonable' fee was left for the courts").

[77] *Cf.* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012) ("The stakes in each of the plaintiffs' claims are great enough to make

For a worker making the federal minimum wage, however, the situation will be very different. A full year of lost wages for that worker will amount to about $14,500, and a typical contingency fee on that amount will be between $4,800 and $5,800.[78] Considering that an employment discrimination case can last for years, require thousands of dollars in direct costs, and demand hundreds of hours of attorney labor, the worker will probably not be able to find effective representation on the basis of that potential contingency fee.[79]

Other claimants who seek representation will be interested only in pursuing injunctive relief,[80] or will face statutorily, constitutionally, or judicially imposed limitations on the monetary relief available to them. The Americans with Disabilities Act's public accommodations title, for example, does not allow for the recovery of damages.[81] Under the Eleventh Amendment, "[s]tates and state officers acting in their official capacity are immune from suits for damages in federal court,"[82] with only limited exceptions. With regard to constitutional violations, qualified immunity prevents the recovery of damages from "all but the plainly incompetent or those who knowingly violate the law."[83] When an injunction or award of nominal damages is the only relief pursued or the only relief available, the contingent percentage fee will not

individual suits feasible. Most of Merrill Lynch's brokers earn at least $100,000 a year, and many earn much more, and the individual claims involve multiple years.").

78 The $14,500 figure is based on 40 hours per week for 50 weeks at the federal minimum wage of $7.25 per hour. The $4,800 and $5,800 figures are based on a 33% and 40% contingent percentage fee, respectively.

79 The difficulty of finding representation for sexual harassment plaintiffs working low-wage jobs—even in a world with fee-shifting statutes, rather than the hypothetical world discussed in the text—motivated the founding of the Time's Up Legal Defense Fund. *See* National Women's Law Center, *Frequently Asked Questions about the Time's Up Legal Defense Fund and the Legal Network for Gender Equity*, https://nwlc.org/times-up-legal-defense-fund/frequently-asked-questions-about-the-times-up-legal-defense-fund-and-the-legal-network-for-gender-equity ("[I]t can be difficult to find a lawyer to take on these types of cases, particularly for those working in low-wage jobs. This Fund will help encourage more lawyers to take on these cases.").

80 For a discussion of claimants who seek only injunctive relief, see *supra* notes 23-24 and accompanying text.

81 *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006).

82 Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 609 n.10 (2001).

83 Malley v. Briggs, 475 U.S. 335, 341 (1986).

provide a financial incentive for a law firm to take on the representation.[84]

Instead of relying on the contingent percentage fee, some claimants will have the wherewithal to pay out of pocket during the pendency of the litigation. Even such a claimant, however, generally "will prefer to bring suit only if the expected award exceeds his payment to the attorney."[85] Moreover, "[a] rational, profit-maximizing attorney will prosecute a plaintiff's claim if and only if the expected payment from the client exceeds the cost of prosecuting the claim."[86] Those conditions mean that economically rational clients will not generally pursue civil rights claims for injunctive relief or nominal damages,[87] even if no other type of relief is available. Such claims thus fall into gaps in the market for legal services.[88]

Congress could have addressed these market gaps in a number of different ways,[89] but it chose—repeatedly, and at very different points in time—to enact fee-shifting statutes.[90] Its reasoning often sounded in

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[84] *See* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 709 (2006) (noting that the contingent-fee market "eliminates cases seeking an injunction or similar order" because "[i]f no money changes hands, nothing drives the market").

[85] Hylton, *supra* note 25, at 1114.

[86] *Id.*

[87] Under some circumstances, even an economically rational claimant might bring suit for injunctive relief or nominal damages. For example, she might expect that the defendant will prefer to enter into a monetary settlement rather than face entry or enforcement of the judgment she seeks. Alternatively, the injunctive relief might give her a competitive advantage or otherwise have significant financial value to her.

[88] One scholar has argued that compensation for risk "should never be necessary because claims that are not profitable ex ante will not be brought." Hylton, *supra* note 25, at 1114. As explained in the text, however, that is precisely the market gap that fee-shifting statutes were meant to address. *Cf.* City of Burlington v. Dague, 505 U.S. 557, 564 (1992) ("[F]or a very large proportion of contingency-fee cases—those seeking not monetary damages but injunctive or other equitable relief—there is no 'market treatment.' Such cases scarcely exist, except to the extent Congress has created an artificial 'market' for them by fee shifting . . . .").

[89] Whether those alternatives would be better than fee shifting (for some value of "better") is beyond the scope of this Article. Because fee shifting is the mechanism we have, it is the mechanism on which I will focus.

[90] *See* City of Riverside v. Rivera, 477 U.S. 561, 576 (1986) (plurality opinion) ("Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.").

concerns about government resources and policy drift. In support of the Civil Rights Attorney's Fees Awards Act of 1976,[91] for example, "a broad and bipartisan coalition of legislators pointed to the success of fee shifting in mobilizing robust private enforcement in the recent civil rights laws; to the insufficiency of executive enforcement; and to the ability of fee-shifting rules to provide needed enforcement without increasing bureaucracy or budgets."[92]

2. Fee arrangements

Although courts often refer to the amount to be paid to the *attorneys*, fee-shifting statutes actually vest fee eligibility in the prevailing plaintiff herself.[93] A law firm can enter into a variety of arrangements with a client who holds this potential entitlement to fees. Three such arrangements are especially relevant here.[94]

First, and most commonly,[95] the client might convey the fee entitlement to the law firm in exchange for representation. Under this arrangement, any payment the firm receives for representing the client will come directly from the defendant.[96] The firm will not be compensated for the representation unless the court deems the plaintiff to be a "prevailing party" or the defendant agrees to pay her attorney's fees. The law firm thus provides the client with risk-bearing services in addition to its attorneys' labor.[97]

Second, if a claim involves the possibility of substantial monetary damages, the client and the law firm might contract for a fee of *either* a

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[91] 42 U.S.C. § 1988.

[92] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 132 (2010); *see also* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (2000) (discussing the benefits of private enforcement as compared to enforcement by agencies).

[93] *See* Silver, *Unloading the Lodestar*, at 877; *see also* Evans v. Jeff D., 475 U.S. 717, 730 (1986) ("Congress bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions.").

[94] To be clear, the discussion here does not attempt to cover all of the potential variations on such agreements. Instead, it focuses on three illustrative categories.

[95] *Silver*, *Unloading the Lodestar*, at 877.

[96] This scenario represents a straightforward example of a fee-shifting statute filling a market gap, as it does not depend on either the possibility of substantial monetary relief or the client's ability to pay.

[97] *See supra* notes 28-32 and accompanying text.

percentage of the monetary recovery, *or* the full fee-shifting award, whichever is greater.[98] If the plaintiff wins and obtains a large enough monetary recovery, the firm will receive a percentage of that recovery;[99] if the plaintiff achieves "prevailing party" status but obtains a smaller monetary recovery, the firm will receive the fee-shifting award;[100] and if the plaintiff loses, the firm will receive no compensation for the representation. Accordingly, as in the first fee arrangement, the law firm provides the plaintiff with both labor and risk-bearing services.

Third, a sufficiently well-off client might pay entirely out of pocket, at the law firm's usual rates, on an ongoing basis. Under this arrangement, any fee-shifting award would have the effect of reimbursing the client (in whole or in part) for attorney's fees already paid.[101] Unlike in the first two arrangements, the law firm does not take on the risk of loss, as it will receive the same compensation regardless of the outcome.[102] Accordingly, this third type of arrangement does not involve the provision of risk-bearing services, and

[98] For an example of this type of agreement, see McKinnon v. City of Berwyn, 750 F.2d 1383, 1393 (7th Cir. 1984). Under this arrangement, the fee-shifting statute might or might not be filling a market gap, depending on how the law firm expected the percentage fee to come into play. For example, the firm might have been using the percentage fee only as a hedge against a potential sacrifice offer. (For a discussion of sacrifice offers, see *supra* notes 50-51 and accompanying text.)

[99] For example, say the percentage set forth in the retainer agreement is 40%, the plaintiff is awarded $500,000 in damages, and the court orders a fee shift of $100,000. In that scenario, the law firm will receive $200,000 (which is 40% of $500,000), and the plaintiff will take home $400,000 (which is the sum of the $500,000 damages award and the $100,000 fee-shifting award, minus the $200,000 counsel fee).

[100] For example, say the percentage set forth in the retainer agreement is 40%, the plaintiff is awarded $200,000 in damages, and the court orders a fee shift of $100,000. In that scenario, the law firm will receive $100,000 (which is the amount of the fee-shifting award), and the plaintiff will take home $200,000 (which is the amount of the damages award).

[101] Under this scenario, the fee-shifting statute is probably not filling a market gap, unless the claimant would not have filed the case without the possibility of reimbursement.

[102] *Cf.* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 716 (1987) (plurality opinion) ("[W]hen the plaintiff has agreed to pay its attorney, win or lose, the attorney has not assumed the risk of nonpayment and there is no occasion to adjust the lodestar fee because the case was a risky one."). In effect, the client has borne the risk herself. One might argue that she should receive a risk premium for doing so, but that argument would run up against the Supreme Court's conclusion that "Congress [likely] contemplated an attorney-client relationship as the predicate for an award under § 1988." Kay v. Ehrler, 499 U.S. 432, 436 (1991).

this Article's discussion of compensation for risk should generally be read to exclude it.

The possibility of a non-contingent fee arrangement raises a question about the fairness (to the defendant) of including compensation for risk in fee-shifting awards: Why should the plaintiff's choice of fee arrangement obligate the defendant to pay a greater amount in attorney's fees?[103] That question can be answered by reference to the purpose of fee-shifting statutes—to encourage private enforcement of the specified laws[104]—and the inability of many (if not most) claimants to pay out-of-pocket for legal services. An extensive body of research has shown that low- and middle-income claimants face tremendous difficulties in finding representation.[105] An indigent client does not truly choose a contingent-fee arrangement; rather, unless a law firm agrees to represent her for free,[106] it is simply the only option available to her. Because of the high and often unpredictable cost of legal services, the same is true of many middle-income clients.[107]

If fee-shifting doctrine deems plaintiffs responsible for funding their own cases up front, then fee-shifting awards will enable litigation only in those cases that plaintiffs could already afford to fund up front—or that law firms are willing to work on for free.[108] Fee-shifting statutes do not aim so low. A "reasonable" statutory fee-shifting award is not one that merely helps to defray a successful plaintiff's out-of-pocket litigation expenses, but one "that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case."[109]

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103 *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 675 (1982) (discussing this argument).

104 *See, e.g.,* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (stating that Congress enacted the fee-shifting statute at issue "to encourage individuals injured by racial discrimination to seek judicial relief"); *see also supra* Part II.A.1.

105 "According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet." DEBORAH RHODE, ACCESS TO JUSTICE 14 (2004).

106 For a discussion of the limited availability of pro bono representation, see *infra* Part II.D.

107 *See* RHODE, *supra* note 105.

108 *See* Karlan, *supra* note 1, at 205–06 ("[M]ost civil rights plaintiffs are unable to afford counsel, and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono.").

109 Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 552 (2010).

3. Market rates

As legislative history makes clear, Congress intended for statutes like Section 1988[110] to "enabl[e] vigorous enforcement of modern civil rights legislation," which "reflects a heavy reliance on attorneys' fees" in order to secure compliance.[111] In recognition of the litigation-enabling purpose of fee-shifting statutes, the Supreme Court has long held that fee awards should be based on "market rates for the services rendered."[112] If a law firm knows that a fee-shifting award will compensate it at market rates for the services it provides, a plaintiff should be able to trade her fee entitlement for effective representation.

With regard to risk-bearing services, the difficulty lies in figuring out *how* to provide market-rate compensation in situations where the contingent-fee market falls short.[113] If the awards are too low, claimants will not be able to use the prospect of a fee-shifting award to attract effective counsel, violators will evade responsibility for fully compensatory fees, and some meritorious claims will never be filed. The claims that do attract qualified counsel will skew away from those seeking injunctive or declaratory relief and toward those seeking large amounts of damages.[114] If the awards are too high, plaintiffs or their counsel will receive a windfall at the defendant's expense, and the filing of high-risk claims may be unduly encouraged.[115]

The underlying questions are both market-based and inescapably normative. How much risk is it reasonable for a profit-motivated law firm to take on—and for a losing defendant to have to pay for? Which

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[110] *See* 42 U.S.C. § 1988 (also known as the Civil Rights Attorney's Fees Awards Act of 1976).

[111] S. REP. 94-1011, 2, 1976 U.S.C.C.A.N. 5908, 5911. Section 1988 also aimed to "deter[] frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce" the provisions listed in a fee-shifting statute. *Id.* at 5912.

[112] Missouri v. Jenkins by Agyei, 491 U.S. 274, 283 (1989).

[113] For a discussion of such market gaps, see *supra* Part II.A.1.

[114] *See supra* Part II.A.2 (discussing fee arrangements in which the law firm will receive, at a minimum, a set percentage of any monetary recovery); *see also* Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) ("The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief.")

[115] *See* Hylton, *supra* note 25, at 1115 (arguing that subsidization in the form of a case-specific risk multiplier could be expected to "lead to an increase in the number of risky claims brought within the subsidized field of litigation").

valid claims should, under a proper interpretation of fee-shifting statutes, be supported by a financial incentive to litigate—and which should be left without that incentive, because it would lead to the filing of too many claims that would ultimately fail, or because it would impose unacceptable costs on defendants? As discussed below, courts have long struggled to find the appropriate balance among these competing concerns.

B. *Early Federal Cases*

When the Third Circuit first introduced the lodestar method in 1973, it identified the "contingent nature of success" as a "factor[] that *must* be taken into account in computing the value of attorneys' services."[116] Ten years later, when the Supreme Court first held that courts should use the lodestar method as a starting point for calculating fee-shifting awards,[117] it likewise did not prohibit contingency adjustments—though neither did it embrace them.[118]

By the mid-1980s, most of the federal appellate courts had allowed contingency enhancements to the lodestar in statutory fee-shifting cases.[119] The prevailing approach was to determine the value of the enhancement on an ex post, case-by-case basis: After the plaintiff had achieved prevailing party status, the court would look backward at the level of risk that the case had presented at the time of its filing, and would award higher levels of compensation for higher levels of risk. Some courts increased the lodestar by an ad hoc percentage, such as

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[116] Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973) (emphasis added).

[117] *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Before the Court's decision in *Hensley*, lower courts used a variety of methods for calculating fees. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 283-84 (1977) ("[T]here are nearly as many approaches . . . as there are judges.").

[118] *Hensley*, 461 U.S. at 424; *see also* Blum v. Stenson, 465 U.S. 886, 901 n.17 (1984) ("We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment.").

[119] *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 717 & n.4 (1987) (collecting cases). At that time, court-ordered compensation for risk already had a long pedigree. *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 83–84 (1989) ("In cases where the fee is set by the court, as in class actions, stockholders' derivative actions, and many suits under federal statutes, courts for over fifty years have routinely taken the contingency factor into account in setting fees.").

10% or 50%, while others multiplied the lodestar by the inverse of the case's initial likelihood of success.[120]

Although most scholars agreed that fee-shifting awards should include compensation for risk, many criticized these case-specific approaches.[121] First, some doubted that a court could accurately determine, after a case had already been resolved in the plaintiff's favor, what the plaintiff's probability of success had been at the time the action was filed.[122] Yet switching from an ex post to an ex ante procedure would create its own set of problems. In particular, encouraging the plaintiff's attorneys to highlight the weaknesses of their client's still-pending case (in order to convince the court that it presented a relatively high amount of risk, and thus that it warranted a relatively high risk multiplier) could create serious conflicts of interest.[123]

Second, some deemed it inappropriate to give plaintiffs' counsel the same incentive to accept a case with a lower likelihood of success as to accept a case with a higher likelihood of success.[124] Viewed on an ex ante basis, applying case-specific multipliers in their exact-inverse form would entail that a fee-shifting case with a 90% likelihood of success (and a correspondingly low multiplier) would have the same expected value to the plaintiff's counsel as a case with only a 10% chance of success (and a correspondingly high multiplier). Accordingly, a perfectly risk-neutral law firm would have an equivalent interest in both.[125] By contrast, a risk-averse law firm would prefer the case with

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[120] For example, if the claim had a 50% chance of success at the time it was filed, the court would apply a 2x risk multiplier to the lodestar amount.

[121] *See* Rowe, *supra* note 25, at 632 (discussing the prevailing scholarly view); *see, e.g.*, John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981).

[122] *See* Leubsdorf, *supra* note 121, at 474; *see also* Rowe, *supra* note 25, at 632 ("It is hard to say in hindsight how much of what turned out to be a silk purse really looked like a sow's ear at the start of litigation, and it is at best unseemly for the winners' lawyer to argue that their now successful claim originally appeared doomed to lose.").

[123] Leubsdorf, *supra* note 121, at 483.

[124] *Id.* at 474 ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one. This theory is as defective as its results would be undesirable . . . .").

[125] *See infra* note 127. Of course, perfect risk neutrality rarely if ever occurs. For a plaintiff-side law firm, risk neutrality is limited by factors including the characteristics of the other cases in its portfolio, its overhead costs, and the liquid resources available to it. Recognizing those limits, one third-party litigation funding (TPLF) provider has

the greater likelihood of success (and the correspondingly lower multiplier).

Finally, some deemed case-specific multipliers to be unjust to the defendant. Viewed on an ex post basis from the defendant's side, applying case-specific multipliers in their exact-inverse form would entail that the cost of aggressively defending a case with a 90% chance of success (and a correspondingly low multiplier) would be less than the cost of aggressively defending a case with only a 10% chance of success (and a correspondingly high multiplier).[126] Because the former cost would come to fruition only if the plaintiff achieved "prevailing party" status, however, the two cases would have the same expected value from an ex ante perspective.[127] Accordingly, a perfectly risk-neutral defendant would not fear one more than the other.[128] By contrast, a risk-averse defendant would be more fearful of the case with the higher multiplier (and the correspondingly lower likelihood of success).[129]

Due to the foregoing concerns about case-specific risk multipliers, some scholars favored the use of a uniform multiplier (i.e. one that

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asserted in its advertising to plaintiff-side law firms that "[f]irms that embrace contingent-fee engagements can quickly surpass the financial risk they're willing to bear." BURFORD CAPTIAL, FINANCE FOR THE FUTURE OF LAW: HOW BURFORD HELPS LAW FIRMS 4 (2018). For further discussion of TPLF, see *infra* Part III.E.

[126] Rowe, *supra* note 25, at 632 ("Large enhancements for low initial chances of winning penalize most those defendants who had the strongest-seeming defenses and thus acted most reasonably in resisting . . . .").

[127] To see this, assume a lodestar value of L and a probability of success of S. For simplicity, assume that the potential outcomes are limited to complete success and complete failure. The exact-inverse, case specific multiplier would be 1/S, and the fee-shifting award would be L * (1/S) = L/S. The defendant would pay the fee-shifting award only if the litigation succeeded, so the expected value of the fee-shifting award would be S * L/S = L. Accordingly, the expected value would directly vary with the lodestar value, but it would not directly vary with the degree of risk presented by the case. (To the extent that the lodestar might be higher for some higher-risk cases, *see supra* Part I.B, that would be so regardless of how the risk multiplier were set.)

[128] Again, perfect risk neutrality rarely if ever occurs. For a defendant, risk neutrality is limited by factors including its financial obligations, time-sensitive business opportunities, and the amount of liquid assets available to it.

[129] It would be inappropriate to recognize this defense-side risk aversion without also recognizing plaintiff-side risk aversion. *Cf.* Schwartz, *supra* note 74, at 310 (discussing the "disingenuousness" of "tears for defendants settling to avoid bankruptcy but apparent indifference to victims settling to avoid destitution").

would not vary with the characteristics of a particular case.)[130] The Supreme Court had an opportunity to weigh in on the question in 1987, but the case did not result in a majority opinion.[131] A four-justice plurality would have held that risk enhancements should almost never be permitted;[132] a four-Justice dissent would have held that risk enhancements should always be required;[133] and a concurrence by Justice O'Connor stated that risk enhancements should sometimes be permitted—but not on the basis of a case-by-case inquiry.[134] In Justice O'Connor's view, any risk multiplier should instead be "based on the difference in market treatment of contingent fee cases *as a class*."[135]

C. City of Burlington v. Dague

Five years later, in *City of Burlington v. Dague*, the question of compensation for risk came back to the Supreme Court.[136] This time, a six-Justice majority squarely rejected risk enhancements, whether case-specific or otherwise. The Court began by noting that a risk enhancement would "likely" result in double-counting of factors already reflected in the lodestar amount.[137] It reasoned that the unenhanced lodestar reflects the difficulty of establishing the merits of a particular case, "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[138] Accordingly, in the

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130 *See, e.g., id.* at 474-75.

131 *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728 (1987) (*Delaware Valley II*), 483 U.S. 711 (1987).

132 *See id.* at 728 (plurality opinion) ("[E]nhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts.")

133 *See id.* at 735 (Blackmun, J., dissenting).

134 *See id.* at 731 (O'Connor, J., concurring).

135 *Id.* (emphasis in the original).

136 505 U.S. 557 (1992). In the interim, the D.C. Circuit had issued an opinion in which it pronounced itself "unable to derive a governing rule from the opinion" in *Delaware Valley II.* King v. Palmer, 950 F.2d 771, 785 (D.C. Cir. 1991). The court "urge[d] the Supreme Court to clarify its position" in light of the difficulties that multiple circuits had experienced. *Id.*

137 *Dague*, 505 U.S. at 562.

138 *Id.* As discussed previously, contrary to the Court's statement, there need not be any relationship between the lodestar value and the degree of risk presented by a particular case. *See supra* Part I.B.

Court's view, the product of hours times hourly rates already includes compensation for contingent risk—despite being based on non-contingent rates.[139]

Next, the Court objected that risk multipliers would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones" and thus would "indiscriminately encourag[e] nonmeritorious claims to be brought."[140] As noted above, this concern arises from the use of risk enhancements determined on a case-by-case basis.[141] Accordingly, it would not be implicated by a standardized adjustment of the type Justice O'Connor had suggested a few years earlier.[142]

The Court in *Dague*, however, also objected to the notion of a uniform risk enhancement based on a plaintiff's average likelihood of success. In the Court's view, because different cases involve different levels of risk, a uniform enhancement would result in an over-compensatory fee in any case with an above-average chance of success.[143] (In any case with a below-average chance of success, a uniform enhancement would result in an under-compensatory fee, but the Court omitted that side of the analysis.)

The Court further reasoned that contingency enhancements would be inconsistent with the "prevailing party" limitation on statutory fee-shifting awards:

> An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect

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[139] The hourly-rate component of the lodestar may reflect the skill and experience of the attorneys, but not the contingent risk presented by the case. *See, e.g.*, Pickett v. Sheridan Health Care Ctr., 664 F.3d 632, 642 (7th Cir. 2011).

[140] *Id.* at 562-63. This analysis rests on an insupportable view of the relationship between litigation risk and merit. *See supra* notes 61-67 and accompanying text.

[141] See *supra* notes 124-125 and accompanying text. Moreover, even in the context of case-specific risk enhancements, the multiplier value could be set in a manner that does not equalize incentives in this manner. *See infra* Part IV.B.4.

[142] An article cited in the *Dague* majority opinion made this very point. *See* Leubsdorf, *supra* note 121, at 474; *see also* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring).

[143] *Dague*, 505 U.S. at 564-65. A uniform risk multiplier could be set in a manner that would satisfy this concern about over-compensation. *See infra* Part IV.C.

> pay for the attorney's time (or anticipated time) in cases where his client does not prevail.[144]

The Court turned next to its prior decisions about the interaction between fee-shifting awards and percentage-based retainer agreements.[145] Drawing on that case law, the Court asserted that it had "generally turned away from the contingent-fee model . . . to the lodestar model."[146] It thus refused "to concoct a hybrid scheme" with features of both.[147] Because fee-shifting awards are contingent upon prevailing-party status, however, the contingency ingredient in that concoction cannot be avoided.[148]

Finally, the Court expressed the view that risk enhancements "would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable."[149] Although the Court did not identify these problems with administrability as features of case-specific enhancements in particular, they are largely inapplicable to a uniform risk enhancement, which would be predictable and simple to administer.[150]

The Court in *Dague* did not question whether risk-bearing is too ancillary to traditional legal services to warrant compensation under fee-shifting statutes. One might have expected such an argument based on the Court's decision the previous year in *West Virginia University*

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[144] *Id.* at 565. For responses to this concern about payment for work on unsuccessful cases, see *infra* Part III.A, III.B.

[145] *See* Venegas v. Mitchell, 495 U.S. 82 (1990) (holding that a statutory fee-shifting award did not eliminate a plaintiff's obligation to ensure that his counsel received the full percentage fee set forth in his retainer agreement); Blanchard v. Bergeron, 489 U.S. 87 (1989) (holding that a percentage-based retainer agreement did not impose a ceiling on the plaintiff's statutory fee-shifting award).

[146] *Dague*, 505 U.S. at 566.

[147] *Id.*

[148] *See* Silver, *supra* note 25, at 333 n.112 ("[T]he court has not rejected the contingent-fee model. To do that, it would have to order lower courts to grant fee awards even when plaintiffs lose. Then, lodestar fees would not be contingent on success in litigation, as they now are.").

[149] *Dague*, 505 U.S. at 566. For a discussion of some state courts' rejection of this concern, see *infra* Part III.A.

[150] *See infra* Part IV.C. Moreover, even in the context of case-specific risk enhancements, the multiplier could be set in a manner that promotes administrability. *See infra* Part IV.B.5.

Hospitals, Inc. v. Casey,[151] which held that the statutory authorization of a "reasonable attorney's fee" does not include expert witness fees.[152] The decision in *Casey*, however, relied on the dozens of federal fee-shifting statutes that explicitly mentioned both attorney's fees and expert witness fees.[153] The Court interpreted that statutory usage to mean that Congress treats attorney's fees and expert fees as "distinct items of expense," such that expert fees should not be shifted unless a statute specifically mentions them.[154] Unlike expert fees, federal fee-shifting statutes do not explicitly mention risk-bearing services as a distinct item of expense. Accordingly, the decision in *Casey* does not require the exclusion of compensation for risk.[155]

Moreover, three years before its decision in *Dague*, the Court had rejected the notion that a "reasonable attorney's fee" should "compensate only work performed personally by members of the bar."[156] Instead, the Court has determined that the statutory language "must refer to a reasonable fee for the work product of an attorney."[157] Such a fee "must take into account the work not only of attorneys, but

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[151] 499 U.S. 83 (1991).

[152] *Id.* at 102. Congress partially abrogated this decision in the Civil Rights Act of 1991. *See* Pub. L. 102-166, 105 Stat. 1071 (1991); *see also* 42 U.S.C. § 1988(c).

[153] Casey, 499 U.S. at 89.

[154] *Id.* at 90-92.

[155] The majority opinion in *Dague* does not cite or discuss *Casey*, an omission that supports this conclusion. By contrast, Justice Blackmun's dissent in *Dague* does include such a citation:

> [I]n some instances Congress explicitly has prohibited enhancements, as in the 1986 amendments to the Education of the Handicapped Act. See 20 U.S.C. § 1415(e)(4)(C) ("[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection"). Congress' express prohibition on enhancement in this statute suggests that it did not understand the standard fee-shifting language used elsewhere to bar enhancement. Cf. West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 92–97, 111 S.Ct. 1138, 1143–1146, 113 L.Ed.2d 68 (1991) (relying, in part, on express authorization of expert-witness fees in subsequently passed fee-shifting statutes to infer that such fees could not have been included in unsupplemented references to "attorney's fees").

Dague, 505 U.S. at 570 n.4 (Blackmun, J., dissenting) (citations, quotation marks, and second alteration in the original).

[156] Missouri v. Jenkins by Agyei, 491 U.S. 274, 283 (1989).

[157] *Id.*

also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit."[158] This reasoning leaves little room for the argument that litigation risk-bearing services are too ancillary to fall under the umbrella of a "reasonable attorney's fee," especially as many law firms routinely provide those risk-bearing services to their clients.[159]

D. The Status Quo

As a result of the Supreme Court's decision in *Dague*, along with other parsimonious interpretations of federal fee-shifting provisions,[160] statutory fee-shifting awards are structurally under-compensatory. The inability to offer a competitive fee undermines fee-shifting claimants' ability to secure representation, just as the Eleventh Circuit anticipated (in a pre-*Dague* opinion) that it would:

> Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys . . . to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in noncontingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment.[161]

Highly skilled attorneys do represent some plaintiffs in fee-shifting cases, but much of that representation occurs on a pro bono or nonprofit basis.[162] Those forms of representation account for too small

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158 *Id.*

159 *See infra* Parts III.B (discussing contingent percentage fees), III.D (discussing alternative fee arrangements).

160 *See supra* notes 42-46 and accompanying text; *see generally* Karlan, *supra* note 1.

161 Yates v. Mobile Cty. Pers. Bd., 719 F.2d 1530, 1534 (11th Cir. 1983).

162 I use "pro bono" here to mean representation provided without expectation of payment or at a deep discount. I recognize that, although that usage is common, it is also flawed. *See* Sabbeth, *supra* note 1, at 442-43; *see also* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 113 (2002) ("Although the term 'pro bono publico' is derived from ancient Rome, American courts used it expansively, until the 1950s,

a segment of the legal market to make up for a structurally inadequate fee-shifting regime. Private attorneys do very little pro bono work: "a lawyer's average pro bono contribution is estimated at less than half a dollar a day and half an hour a week,"[163] and "pro bono service occupies less than one percent of lawyers' working hours."[164] For their part, legal aid programs "turn away as many clients as they accept,"[165] and "[f]ewer than one in ten lawyers accept referrals from legal aid programs or groups serving low-income communities."[166] Public interest legal organizations operate on a shoestring budget, but they still must turn down promising fee-shifting cases because they cannot afford to bring them.[167] For financial reasons, at least one private public-interest law firm generally avoids fee-shifting cases in which the claimant seeks only injunctive relief.[168]

When profit-motivated representation occurs, it often results not from the potential for a fee-shifting award, but from the expectation of a contingent percentage fee.[169] The functioning of the contingent percentage fee, however, depends on the availability of a sufficient amount of monetary relief.[170] Some profit-motivated firms represent civil rights clients in relatively high-damages cases, and make a great deal of money doing so, but the success of that business model does

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referring to the broad concept of what was within the public interest, and not to charitable legal representation.").

163 Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 887 (2009).

164 Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 62 (2003).

165 Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 80 (2007); *see also* Rhode, *supra* note 164, at 62 ("civil legal aid programs now reflect less than one percent of the nation's legal expenditures").

166 *See* Rhode, *supra* note 163, at 887.

167 *See, e.g.*, Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS AM. ACAD. 62, 75-76 (2016).

168 *See* Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 87-88 (2012).

169 *See* Reingold, *supra* note 21, at 19 n.57 ("Today the private bar views an ordinary tort case and a civil rights case the same. Without good damages, the plaintiff will not be able to find a private lawyer to represent him (other than very rare pro bono publico representation).").

170 *See supra* Part II.A.1.

not mean that fee-shifting statutes are functioning well. Nor does it provide counsel for claimants who seek only injunctive relief or relatively low amounts of damages.[171]

The high rates of pro se representation in civil rights cases reflect the failure of fee-shifting statutes to enable claimants to find counsel. Of the 36,984 non-prisoner civil rights cases filed in 2015, more than a quarter (26%) involved a pro se plaintiff suing a represented defendant.[172] Moreover, research confirms the unremarkable proposition that "[p]laintiffs who proceed on their own rarely do so with success."[173] To be sure, attorneys perform a gatekeeping function, and some claims that are brought pro se would have failed under any circumstances. The federal courts' inhospitability to pro se plaintiffs,[174] however, makes it hard to know how many of those claimants might otherwise have prevailed. It is similarly difficult to know how often claimants have been deterred from filing a lawsuit because they could not secure representation. Accordingly, when it comes to civil rights claimants affected by the parsimonious interpretation of federal fee-shifting statutes, the high rates of pro se litigation might represent only the tip of the iceberg.[175]

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[171] *See* Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807, 1811 (2013) ("Indeed, only a fee-shifting regime can enable plaintiffs to bring meritorious, low-value suits, which plaintiffs routinely must forego in a non-fee-shifting regime."). *Cf.* Reingold, *supra* note 21, at 41 (reporting that "private plaintiffs' lawyers have stopped taking low-damages and injunctive-relief civil rights cases because the lawyers have learned that they cannot make money on them").

[172] By contrast, less than two percent involved a represented plaintiff suing a pro se defendant, and less than a tenth of a percent involved a pro se plaintiff suing a pro se defendant. These numbers are based on data downloaded from the Federal Judicial Center's Integrated Database, available at https://www.fjc.gov/research/idb.

[173] Daniels & Martin, *Texas Plaintiffs' Practice*, *supra* note 29, at 287. For example, a 1993 study of closed medical malpractice claims in Wisconsin showed that "the success rate for claimants represented by counsel was 34%," while the success rate for the remaining claimants was less than 6%. *Id.* at 319 (citing Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* 6 (Am. B. Found. Working Paper No. 9210, 1993)).

[174] *See, e.g.*, RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 31 (2017) (describing the "downright indifference of most judges to the needs of pro se's" and noting that "judges often are distracted, preoccupied, or uninterested in pro se cases").

[175] *Cf.* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y REV. 631,

The structurally under-compensatory nature of federal fee-shifting awards, and the attendant suppression of civil rights claims, is probably not accidental. This status quo might instead reflect judicial disapproval of the "private attorney general" model of enforcement, hostility to the substantive laws supported by fee-shifting statutes, or some combination of both.[176] Nevertheless, I am unwilling to assume that reasoned argument carries no force at all. Even if a judge might be inclined to accept a somewhat weak argument that aligns with her priors, she might be disinclined to accept a deeply flawed one. As this Article demonstrates, the arguments against compensation for risk under federal fee-shifting statutes fit the latter description.

III. COMPENSATION FOR RISK IN OTHER CONTEXTS

Contingent risk is not limited to federal fee-shifting cases. To the contrary, law firms and lenders routinely take on this type of risk,[177] and courts and markets routinely compensate them for it. The mechanisms through which that compensation occurs include state fee-shifting statutes, contingent percentage fees, common-fund awards, alternative fee arrangements, and third-party litigation funding. This Part analyzes these mechanisms, each of which yields potentially useful information about whether and how to incorporate compensation for risk into federal statutory fee-shifting awards.

Because the Supreme Court in *Dague* expressed concern that compensation for risk would be judicially unworkable,[178] would unduly encourage non-meritorious litigation,[179] and would improperly compensate counsel for cases in which the plaintiff's law firm did not prevail,[180] this Part will pay particular attention to those concerns. It will also attend to the question whether risk multipliers should be uniform or case-specific, as that question generated significant pre-*Dague* debate among courts and commentators.[181]

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636 (1981) (examining the mechanisms through which "only a small fraction of injurious experiences ever mature into disputes").

176 *See* Silver, *Incoherence and Irrationality*, *supra* note 25, at 304-05 (evaluating these possibilities).

177 For a discussion of the type of risk I mean to include here, see *supra* Part I.

178 City of Burlington v. Dague, 505 U.S. 557, 566 (1992).

179 *Id.* at 562-63.

180 *Id.* at 565.

181 *See supra* Part II.B.

A. *State Fee-Shifting Statutes*

States have enacted a wide range of fee-shifting statutes that, like their federal counterparts, aim to encourage litigation that serves the public interest.[182] After the Supreme Court decided *Dague*, which addressed the question of compensation for risk under *federal* fee-shifting statutes, the courts of several states revisited the question of compensation for risk under these *state* fee-shifting statutes.[183] Some of those statutes are interpreted in lockstep with their federal counterparts, whether because of a statutory provision to that effect,[184] or because courts have required consistency between state and federal fee-shifting standards.[185] For the statutes interpreted in this manner, *Dague* directly resulted in the elimination (or prevention) of contingency enhancements.[186]

More interesting are the state fee-shifting statutes that have required an independent conclusion about compensation for risk.[187]

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[182] Courts usually use the lodestar method when calculating state fee-shifting awards, though at least one state has permitted use of the percentage method. *See* Griffith v. Clear Lakes Trout Co., 200 P.3d 1162, 1172 (Idaho 2009).

[183] Federal courts have addressed this question, but they have done so on a predictive basis, as state courts have the ultimate say on questions of state law. *See, e.g.,* Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 535 (3d Cir. 1997) ("We predict that the Pennsylvania Supreme Court would permit a trial court to enhance the lodestar amount to account for a particular case's contingent risk only to the extent that those factors creating the risk are not already taken into account when calculating the lodestar amount.").

[184] *See, e.g.,* Fla. Stat. Ann. § 760.11 ("It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.").

[185] *See, e.g.,* Dutcher v. Randall Foods, 546 N.W.2d 889, 897–98 (Iowa 1996) ("[T]he method of calculating attorney fees should not vary between state and federal courts. Therefore, we adopt the federal analytical framework for the calculation of attorney fees under the Iowa Civil Rights Act.").

[186] *See, e.g.,* Winn-Dixie Stores, Inc. v. Reddick, 954 So. 2d 723, 729 (Fla. Dist. Ct. App. 2007) (reversing a trial court decision applying a risk multiplier because of the Supreme Court's intervening decision in *Dague*); Meyers v. Chapman Printing Co., 840 S.W.2d 814, 826 (Ky. 1992) (noting that "the trial court was ahead of the United States Supreme Court" when, shortly before *Dague* was decided, it held contingency enhancements to be impermissible).

[187] Some state statutes and procedural rules explicitly require courts to consider contingent risk when setting fee amounts. *See, e.g.*, Idaho R. Civ. P. Rule 54 (requiring courts to consider "whether the fee is fixed or contingent" when determining the amount of attorney fees); Wis. Stat. Ann. § 814.045(1)(k) (same); Wyo. Stat. Ann. § 1-14-126 (same).

The courts of multiple states have deemed such compensation to be permissible,[188] and they have provided for case-specific (rather than uniform) compensation for risk.[189] For example, the New Jersey Supreme Court wrote in 1995 that "a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed."[190]

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[188] *See* Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122, 1132 (Fla. 2017) ("[T]he contingency fee multiplier provides trial courts with the flexibility to ensure that lawyers, who take a difficult case on a contingency fee basis, are adequately compensated."); Pennaco Energy, Inc. v. Sorenson, 371 P.3d 120 (Wyo. 2016) (applying a multiplier in a contractual fee-shifting case, to which Wyoming courts apply the same standards as in a statutory fee-shifting case); USA Power, LLC v. PacifiCorp, 2016 UT 20, ¶ 96, 372 P.3d 629, 665 (Utah 2016) (noting, in a case brought pursuant to the Utah Uniform Trade Secrets Act, that "the lodestar method permits a court to apply a 'multiplier' to increase or decrease the total award in order to account for a number of factors, such as the contingent nature of the case, the risks assumed, and the delay in payment.") (citation and internal quotation marks omitted); Berry v. Volkswagen Grp. of Am., Inc., 397 S.W.3d 425 (Mo. 2013) (en banc); Atherton v. Gopin, 272 P.3d 700, 702 (N.M. 2012) ("'An award based on a lodestar may be increased by a multiplier if the lower court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained.'") (quoting In re N.M. Indirect Purchasers Microsoft Corp., 149 P.3d 976, 992 (N.M. 2006)); Chuong Van Pham v. City of Seattle, 151 P.3d 976, 983 (Wash. 2007) (interpreting Washington's Law Against Discrimination to "occasionally" permit contingency multipliers because "the WLAD places a premium on encouraging private enforcement and . . . the possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases"); Toshiba Mach. Co., Am. v. SPM Flow Control, Inc., 180 S.W.3d 761, 783 (Tex. App. 2005), *review granted, and remanded by agreement* (Mar. 31, 2006) ("Texas courts consistently allow the use of a multiplier based upon the contingent nature of a fee under Texas statutes allowing recovery of attorney's fees."); Schefke v. Reliable Collection Agency, Ltd., 32 P.3d 52, 94 (Haw. 2001) (permitting contingency enhancements and concluding that *Dague*'s dissenting opinion is "better reasoned than *Dague*'s majority opinion"); Ketchum v. Moses, 17 P.3d 735, 744 (Cal. 2001) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." (quoting Berger, *supra*, at 324-25)); Rendine v. Pantzer, 661 A.2d 1202, 1228 (N.J. 1995).

[189] *See, e.g.,* Silver Creek Investments, Inc. v. Whitten Const. Mgmt., Inc., 307 P.3d 360, 369 (Okla. Ct. App. 2013) ("The contingent nature of the attorney's employment allows the district court to adjust upward the basic hourly rate by allowing a risk-litigation premium based on the likelihood of success at the outset of the representation.") (citation and internal quotation marks omitted).

[190] *Rendine*, 661 A.2d at 1228. Other courts have been less categorical. For example, the Washington Supreme Court wrote that "[w]hile we presume that the lodestar represents a reasonable fee [under the Washington Law Against Discrimination,]

Some of these state courts have expressly disagreed with some or all of the reasoning in *Dague*. In 2001, for example, the Supreme Court of Hawai'i concluded that "contingency enhancement would not result in compensation for cases lost by plaintiff's counsel, as posited by the *Dague* majority."[191] In support of that conclusion, the court noted that risk enhancements would not vary with the amount of time an attorney had spent on losing cases.[192] To the contrary, "'[a] lawyer who loses ninety-nine cases before eking out a win receives the same percentage enhancement in the successful case as a lawyer who wins one hundred times in a row.'"[193]

Similarly, when the Supreme Court of Florida reaffirmed the permissibility of case-specific compensation for risk under a state fee-shifting statute in 2017,[194] it expressly rejected the concern expressed in *Dague* about administrability. The Florida court "conclude[d] that there is no support in state courts, and indeed none has been offered, that the availability of contingency fee multipliers 'make the setting of fees more complex and arbitrary.'"[195] The court also disagreed with the concern expressed in *Dague* that compensation for risk would unduly encourage the filing of "nonmeritorious" claims, reasoning that "solely because a case is 'difficult' or 'complicated' does not mean that the case is nonmeritorious."[196]

In sum, numerous courts have interpreted state fee-shifting statutes to allow case-specific compensation for risk. In doing so, some have explicitly rejected the concerns expressed in *Dague* about payment for work on unsuccessful cases, administrability, and the encouragement of non-meritorious litigation.

B. *Contingent Percentage Fees*

As compared to 1992, when the Supreme Court invoked the private-market contingency fee as support for its prohibition on

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occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." *Chuong Van Pham*, 151 P.3d at 983 (emphasis added).

[191] *Schefke*, 32 P.3d at 97.

[192] *Id.*

[193] *Id.* (quoting Silver, *Incoherence and Irrationality*, at 332).

[194] *Joyce*, 228 So. 3d at 1132.

[195] *Id.* at 1133 (quoting *Dague*, 505 U.S. at 566).

[196] *Id.* at 1132–33.

compensation for risk,[197] a far richer body of scholarship is now available about the mechanics of private contingency practice.[198] Herbert Kritzer's study of Wisconsin contingent-fee lawyers in the mid-1990s is particularly instructive.[199] Contrary to the Court's characterization of such attorneys, Kritzer found that they behaved not like risk-loving gamblers,[200] but like risk-balancing investment managers.[201]

The attorneys Kritzer studied sought to put together a portfolio of cases with a healthy balance of risks and rewards.[202] In order to maintain that balance, the attorneys agreed to represent only about half of the potential clients who contacted them.[203] The specific risks presented by each case weighed heavily in the attorneys' case selection decisions. Those case-specific risks included "the uncertainty of achieving any recovery, the size of that recovery, and the size of the investment needed to obtain that recovery."[204]

As the Wisconsin study demonstrated, unlike a client who enters into the typical billable-hour arrangement, a client who enters into a contingent-fee agreement does not simply purchase an attorney's labor.[205] Rather, the client also buys case-specific financing and insurance, by way of the law firm's agreement not to require payment until the case ends (the financing component) and to require only a payment proportional to the success of the case (the insurance component).[206] Like other contracts involving financing and insurance,

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[197] City of Burlington v. Dague, 505 U.S. 557, 565 (1992); *see also supra* Part II.C.

[198] *See* sources listed in *supra* note 29.

[199] *See generally* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29 (discussing the Wisconsin study); Kritzer, *Wages of Risk*, *supra* note 29 (same).

[200] *See Dague*, 505 U.S. at 565.

[201] *See* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 15-16.

[202] *See id.*

[203] *Id.* at 71.

[204] *Id.* at 18; *see also* Daniels & Martin, *Texas Plaintiffs' Practice*, *supra* note 29, at 300 ("Merely being successful in a case may not be enough. Anything affecting the cost of handling cases or the time it takes to get an award may cause problems. A lawyer may still face financial problems if the compensation is not sufficient to cover both the client's needs and the lawyer's investment of time and money, or if the time it takes to get the award increases.").

[205] Kritzer, *Wages of Risk*, *supra* note 29, at 270.

[206] *Id.* at 270-71; *see also supra* notes 30-32 and accompanying text.

a contingent-fee agreement is informed by the value of the risk-bearing services to be provided.[207] Extracting a premium for providing those risk-bearing services, as opposed to requiring payment only for the attorneys' labor, is precisely what an economist would expect a risk-bearer to do.[208]

Moreover, an economist would expect a law firm to charge that risk premium even if it took only one case on contingency, just as she would expect a bank to charge interest even if it made only one loan. It is thus peculiar to say, as the Supreme Court did in *Dague*, that "[t]o award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail."[209] To be sure, successful contingent-fee cases subsidize the unsuccessful ones, in the sense that only the former will keep the lights on. Contingent-fee firms take a portfolio-balancing approach to case selection in order to position themselves to bear the risk presented by the next case; the need to take those steps supports, rather than undermines, the conclusion that risk-bearing warrants compensation.

If law firms routinely charged their clients by the hour in contingent-fee cases, courts would be able to provide compensation for risk by simply using those hourly rates when calculating the lodestar amount.[210] Private contingency arrangements, however, almost never take the form of a wholly contingent hourly fee.[211] The vast majority of

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[207] Kritzer, *Wages of Risk*, *supra* note 29, at 270.

[208] *Id.* at 293. If the law firm cannot extract an adequate risk premium by charging a fee that the market will bear and the law will allow, it will not take on the case. *See* Daniels & Martin, *Texas Plaintiffs' Practice*, *supra* note 29, at 287-88.

[209] *Dague*, 505 U.S. at 565; *see also* McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails.").

[210] *Cf.* Rendine v. Pantzer, 661 A.2d 1202, 1230 (N.J. 1995) ("Determination of the amount by which a lodestar fee should be enhanced to reflect the risk of nonpayment is conceptually difficult because there is 'no such thing as a market hourly rate in contingent litigation.'" (quoting 2 Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees ¶ 16.04[4][b], at 16–153 (rev. ed. 1990))).

[211] S*ee* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 40; *see also* Silver, *supra* note 17, at 36-37 (describing the contingent hourly fee as a mechanism that "the market squarely rejects"). As discussed *infra* Part III.D, some law firms offer *partially* contingent hourly rates as an alternative to traditional hourly billing.

such arrangements take the form of a contingent percentage fee, under which the law firm receives a percentage of the client's monetary recovery, regardless of the number of hours worked.[212]

Because the percentage fee generally reflects a presumption that the value of a case can be measured solely in terms of monetary relief, it is a poor fit for statutory fee-shifting cases, especially those involving injunctive relief or low damages amounts.[213] In such cases, limiting a fee-shifting award to a percentage of the monetary recovery would undervalue the public benefits of the litigation.[214] As the Supreme Court has recognized, "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."[215]

The percentages charged on the contingent-fee market typically fall into a narrow range, between 33 and 40 percent,[216] with a one-third fee

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[212] Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 740 (2002); *see also* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 39. Under some contingent-fee contracts, the percentage varies according to the stage at which the case is resolved. *See infra* note 216. That type of agreement functions like a contingent hourly rate in the sense that the fee roughly correlates to the number of attorney-hours the case requires. Even so, it does not set forth an hourly rate that a court could plug into the lodestar.

[213] *Cf. Dague*, 505 U.S. at 566 n.* (recognizing the "severe problems of administration" that would be involved in "determining the value of injunctive relief" for purposes of awarding a percentage fee in injunction-only fee-shifting cases).

[214] *See* Blanchard v. Bergeron, 489 U.S. 87, 96 (1989) (rejecting the notion that a contractual percentage fee should be a cap for a statutory fee-shifting award, as "to hold otherwise would be inconsistent with the statute and its policy and purpose").

[215] *Id.* (quoting Riverside v. Rivera, 477 U.S. 561, 574 (1986)). Unlike the percentage approach, the lodestar method decouples the counsel fee from the amount of monetary relief obtained. *See, e.g.,* In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998) ("The lodestar method . . . is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.").

[216] Kritzer, *Dogged Myths*, *supra* note 212, at 740; *see also* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 39. Some firms offer tiered rates based on the stage at which the case is resolved, with lower percentages attaching to cases settled before trial than for cases taken up on appeal. KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 40. In the early days of the American contingency fee, rates often amounted to fifty percent or more; but for the past several decades, they have tended to fall into the narrower range described in the text. Marc Galanter, *Anyone Can Fall Down A Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 469 (1998).

being most common.[217] Moreover, individual law firms tend not to tailor their percentage rates to the level of risk presented by each particular case.[218] This convergence among and within law firms suggests that some standardization of risk multipliers in statutory fee-shifting cases would be appropriate.[219]

The extent of the convergence, however, should not be overstated. In particular, because monetary recoveries vary, a relatively standardized *percentage* does not mean a relatively standardized *fee*. A referral process funnels higher-recovery cases—which yield higher fees—to law firms with stronger capitalization and expertise.[220] The hourly-rate component of the lodestar should already account for the some of the effects of this sorting by capturing a particular firm's position in the referral hierarchy. Some degree of case-specific tailoring would still be appropriate, however, to reflect that different cases can often be expected to land with different firms.

In sum, research conducted over the past two decades has demonstrated that private-market contingent-fee attorneys commonly provide and receive compensation for risk-bearing services. Moreover,

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[217] *See* Kritzer, *supra* note 212, at 757-58 (describing one study finding that 60% of attorneys charged a one-third percentage fee, and another finding that 55% of attorneys charged a one-third percentage fee); KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 39 (noting variation in flat and variable percentage rates charged by surveyed attorneys, but finding that in those cases involving a fixed percentage fee not determined by statute or regulation, "one-third was by far most common, accounting for 93 percent of the fixed percentage fees").

[218] *But see* KRITZER, REPUTATIONS AND REWARDS, *supra* note 29, at 41 (noting some attorneys' willingness to lower their percentage rates for particular cases). Some firms will also charge different percentage rates for different types of cases, e.g. automobile accidents vs. medical malpractice.

[219] The convergence probably reflects legal constraints and market imperfections. Presumably, most law firms will charge whatever the market will bear and the law will allow. *See supra* note 47 and accompanying text. When the former exceeds the latter, percentage rates can be expected to converge on the legal maximum. For example, a 2017 study of contingent-fee practice in New York found that "[a]ttorneys' fees were exactly one-third of net recovery in most cases." Helland et al., *supra* note 29, at 1989. The authors noted that "[o]ne-third is the maximum allowed by the New York courts, except when a sliding scale fee is used, which is rare." *Id.*

[220] A client might initially approach an attorney who lacks the necessary capital or expertise, or who otherwise does not see a sufficient upside to pursuing that client's case. Such an attorney will often refer the client "up the chain" to counsel better able to represent her, or "down the chain" to counsel with lower opportunity costs. Yeazell, *supra* note 84, at 707-08.

the mechanics of contingent-fee practice provide some support for determining risk enhancements on a case-specific basis.

C. *Common-Fund Awards*

In class actions for monetary relief, the "common fund" doctrine allows courts to compensate class counsel by awarding them a portion of the class recovery.[221] As with statutory fee shifting, the court's charge is to award a "reasonable" fee, and private-market rates provide the touchstone for reasonableness.[222] Notwithstanding these similarities, courts follow a different set of rules for calculating common-fund awards than for statutory fee-shifting awards.[223] Most important for present purposes, federal courts are permitted to include compensation for risk in common-fund awards.[224]

Courts use both the lodestar and the percentage method to calculate common-fund awards, though the latter approach is far more common.[225] When courts use the lodestar method, they are permitted to award compensation for risk by way of a risk multiplier.[226] When courts use the percentage method, they tend to award higher percentages in high-risk cases than in low- and medium-risk cases.[227]

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[221] *See, e.g.,* Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("[A] litigant or a 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.").

[222] *See* Morris A. Ratner, *Class Counsel as Litigation Funders*, 28 GEO. J. LEGAL ETHICS 271, 310 (2015) (common-fund awards); *supra* Part II.A (statutory fee-shifting awards).

[223] *See* Rubenstein, 5 Newberg on Class Actions § 15:90 (5th ed.); *see also* Ratner, *supra* note 222, at 279-80 & n.35.

[224] *See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003) ("As in a statutory fee-shifting case, a district court in a common fund case can apply the lodestar method to determine the amount of attorneys' fees. In common fund cases, however, the court can apply a risk multiplier when using the lodestar approach.").

[225] *See* Theodore Eisenberg et. al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 945 (2017) (finding that courts used the percentage method in about 92% and the lodestar method alone in about 6% of the class actions studied); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements*, 7 J. EMPIRICAL LEGAL STUDIES 248, 267-68 (2010) (finding that courts used the percentage method in about 80% and the lodestar method alone in about 10% of the class settlements studied); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 832 (2010) (finding that courts used the percentage method in 69% and the lodestar method alone in 12% of the class settlements studied).

[226] *Id.*; *see also* Fitzpatrick, *supra* note 225, at 835.

[227] Eisenberg & Miller, *supra* note 225, at 278.

Either way, as the authors of one study put it, "courts systematically reward risk" in common-fund cases.[228] They generally do so on the basis of case-specific factors, reasoning that "[t]he greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."[229]

Does the same logic support case-specific compensation for risk under federal fee-shifting statutes? Answering that question requires an examination of the differences between the common-fund and fee-shifting contexts. Setting aside the "prevailing party" restriction,[230] the strongest candidate for a relevant distinction consists of the source of the fee, as the common-fund doctrine "rests on a theory of sharing the cost among those aligned with the plaintiff rather than extracting it from the defeated adversary."[231] Common-fund awards thus involve fee spreading rather than fee shifting.

Drawing on this distinction, the Ninth Circuit has noted that "[i]n common fund cases, there is no concern about financially burdening a defendant to compensate for the risk of nonpayment, because the attorney's fee award is deducted from the plaintiffs' fund."[232] On this view, although it is fair to ask absent class members to share more of the wealth in the event of the plaintiffs' unlikely win,[233] it would not be fair to ask a defendant to bear more of the cost in the event of the defendant's unlikely loss.

This view would carry more weight if statutory fee-shifting awards were meant to be proportional to the defendant's culpability and the defendant's culpability were proportional to the plaintiff's ex ante litigation risk. If both of those things were true, courts might deem it inappropriate to award higher fees in cases that were in some sense close—for example, because the law was unsettled and the defendant reasonably believed its behavior to be lawful, or because the

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[228] *Id.* at 265; *see also* Eisenberg et al., *supra* note 225, at 958 (finding that "the association between risk and fee percentage continues in the 2009-2013 data" but "is not as clear-cut").

[229] Silverman v. Motorola Sols., Inc., 739 F.3d 956, 958 (7th Cir. 2013). *But see infra* Part IV.B.1 (recognizing the advisability of imposing a ceiling on compensation for risk under federal fee-shifting statutes).

[230] For discussion of the "prevailing party" restriction, see *supra* Parts III.A & III.B.

[231] Rowe, *supra* note 25, at 662.

[232] Fischel v. Equitable Life Assur. Soc'y of U.S., 307 F.3d 997, 1008 (9th Cir. 2002).

[233] *Id.*

defendant's conduct was not so obvious or egregious that the plaintiff's victory was assured.[234] The Third Circuit once expressed a similar view, opining that "[t]he contingency factor loses its legitimacy when the penalty imposed on the party at fault is in inverse proportion to his culpability."[235]

A defendant's culpability, however, has no necessary relationship to the plaintiff's ex ante litigation risk. A wide range of circumstances can cause a disconnect between the two. Even if a defendant has engaged in egregiously bad behavior, it might have a plausible argument that an affirmative defense, statutory exception, or immunity doctrine protects it from liability.[236] The difficulty of proving the plaintiff's claim might result not from any ambiguity in the facts or the law, but from the defendant's successful intimidation or silencing of other claimants and potential witnesses.[237] More broadly, the question whether a plaintiff will be able to produce sufficient admissible evidence for every element of her claim is not equivalent to the question whether the defendant actually engaged in the alleged misconduct.[238] Not all paths to a defense victory run through morally salient terrain.

More important, the purpose of a fee-shifting statute is not to heap additional punishment on the losing defendant, but "to ensure

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[234] *See* Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983) ("Where, as in this case, the award is statutory, the assessment of a counsel fee is to some extent a penalty for violating the law. From the defendant's standpoint, then, it is inconsistent to increase the fee when the defendant's liability was doubtful, but reduce it when the violation was flagrant and easily proved.").

[235] *Id.*

[236] *Cf.* Menocal v. GEO Grp., Inc., 320 F.R.D. 258, 264 (D. Colo. 2017), aff'd, 882 F.3d 905 (10th Cir. 2018), cert. denied, 139 S. Ct. 143 (2018) (immigration detainees alleged that for-profit detention facility forced them to clean toilets, showers, and other common areas without pay, and defendant argued that a "civic duty" exception to the forced labor statute made its actions lawful).

[237] *Cf.* Susan Faludi, *'She Said' Recounts How Two Times Reporters Broke the Harvey Weinstein Story*, N.Y. TIMES, Sept. 8, 2019 (discussing the months of investigation required to publish a story about Harvey Weinstein, who has since been accused by more than 80 women of sexual misconduct over a period of decades); Jennifer Szalai, *In 'Catch and Kill,' Ronan Farrow Recounts Chasing Harvey Weinstein Story*, N.Y. TIMES, Oct. 11, 2019 (describing the pressure brought to bear against reporting on the Weinstein allegations).

[238] In some circumstances, the strength of the admissible evidence produced at trial might correlate to the risk of an erroneous decision in the plaintiff's favor. Ex ante litigation risk, however, has no necessary relationship to strength of the admissible evidence produced at trial.

'effective access to the judicial process' for persons with civil rights grievances."[239] Consistent with this purpose, courts properly focus on the *plaintiff* rather than the *defendant* when calculating a fee-shifting award—asking questions like the extent to which the plaintiff prevailed, the number of hours the plaintiff's attorneys reasonably spent on the litigation, and the reasonable hourly rates of the plaintiff's attorneys.[240] The overall question is what a claimant would need in order to secure effective representation on the private market. If the market generally requires higher fees for higher-risk cases—as appears to be the case—then any "concern[s] about financially burdening a defendant to compensate for the risk of nonpayment"[241] are simply beside the point.

In sum, courts routinely award case-specific compensation for risk in common-fund cases, and differences between the two contexts do not compel a different result in statutory fee-shifting cases.

D. Alternative Fee Arrangements

Unlike contingent percentage fees and common-fund awards, traditional hourly billing results in compensation regardless of whether the client wins or loses, and the amount of the compensation does not depend on the extent of the client's success. The billable-hour mechanism has drawn criticism on multiple grounds,[242] and in response, private law firms have increasingly offered alternative fee arrangements ("AFAs") to their clients.[243] Particularly relevant here, some AFAs aim to better align law firm and client incentives by requiring the firm to take on some of the client's risk of loss.[244]

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[239] Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting H.R.Rep. No. 94–1558, p. 1 (1976)); *see also supra* Part II.A.

[240] *See Hensley*, 461 U.S. at 429.

[241] *Fischel*, 307 F.3d at 1008.

[242] *See, e.g.*, AMERICAN BAR ASSOCIATION COMMISSION ON BILLABLE HOURS (2002); David Graeler & Thomas D. Long, *The End of the Hour*, L.A. LAW., Sept. 2014, at 28; WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS (1996).

[243] Ellen Freedman, *Alternative Fee Arrangements: Not a Passing Fad*, PENNSYLVANIA LAWYER, July/August 2017 (discussing a study in which "[o]ver 94 percent of surveyed firms reported using some form(s) of non-hourly billing"); *see also* Peggy Kubicz Hall, *I've Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 WM. MITCHELL L. REV. 154, 226 (2012) (noting the "decided trend against the use of billable hours for legal services").

[244] *See* ALM Legal Intelligence, *Who Really Drives AFA Use–and Why?* (May 2015).

One type of risk-sharing AFA is sometimes called a "partial contingency fee."[245] Pursuant to this arrangement, a law firm receives a lower-than-usual fee on a non-contingent basis, plus a contingent bonus payable upon the achievement of specified goals.[246] For example, the law firm O'Melveny & Myers recently agreed to a risk-sharing AFA when representing a defendant in connection with an anti-SLAPP motion and motion to dismiss.[247] The defendant would pay an up-front flat fee of $25,000, which the firm would keep regardless of the outcome.[248] If the defendant's motions were granted, it would then pay a "success fee" amounting to 150% of the firm's regular rates.[249] The firm later explained that "[t]he potential for the additional recovery beyond standard rates compensated for the risk O'Melveny undertook," and that the 50% premium was "in line with the success fee premiums sought in other cases *with similar amounts of risk*."[250] This example suggests both that the private market attaches monetary value to risk-bearing services, and that the value of those services is tied (in at least some instances) to case-specific factors.[251]

The Supreme Court discussed risk-sharing AFAs in its 2010 decision in *Perdue v. Kenny A.*[252] There, the district court had awarded a lodestar enhancement for counsel's "superior performance and results."[253] The Court rejected the plaintiffs' argument that the

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245 *See Brief for Law and Economics Scholars as Amici Curiae Supporting Respondents*, Perdue v. Kenny A., 2009 WL 2777659, at 10-11.

246 *Id.*

247 Open Source Sec., Inc. v. Perens, No. 17-CV-04002-LB, 2018 WL 2762637, at *1–2 (N.D. Cal. June 9, 2018).

248 *Id.*

249 *Id.* The flat fee would be credited against this success fee. *Id.*

250 *Id.* (emphasis added).

251 Similarly, in Kirkland & Ellis' version of the partial contingency fee, the firm "receives a portion of its hourly rate plus a smaller percentage of any recoveries in the lawsuit." Kirkland & Ellis LLP, *Client Information: Alternative Fee Arrangements*, *at* http://www.kirkland.com/sitecontent.cfm?contentID=341 (last visited Aug. 17, 2018). Because it ties the risk premium to the amount of the actual recovery, this AFA depends on case-specific factors. *See also* Kubicz Hall, *supra* note 242, at 210-11 (counseling those considering AFAs to recognize that "[e]very project has risks" and to consider the extent to which "a fair price should reflect those risks").

252 559 U.S. 542, 556-57 (2010) (describing an AFA in which "attorneys are paid at a reduced hourly rate but receive a bonus if certain specified results are obtained").

253 *Id.* at 546.

performance enhancement was analogous to a partial contingency fee,[254] reasoning that "[a]n attorney who agrees, at the outset of the representation, to a *reduced hourly rate* in exchange for the opportunity to earn a performance bonus is in a position far different from an attorney in a § 1988 case who is compensated at the *full prevailing rate* and then seeks a performance enhancement in addition to the lodestar amount after the litigation has concluded."[255]

Whatever the merits of the Court's analysis with respect to performance enhancements, its opinion does not bear on the correctness of the assertion I make here, which is that risk-sharing AFAs weigh in favor of case-specific compensation for risk in statutory fee-shifting cases. Performance enhancement depends on whether, viewing the litigation on an *ex post* basis, counsel performed the contracted services so well that additional compensation is appropriate. By contrast, risk enhancement depends on whether, viewing the litigation on an *ex ante* basis, counsel has agreed to provide risk-bearing services that independently warrant compensation.[256]

Similarly, the Court viewed the inquiry with respect to performance enhancements as whether a firm should receive a "bonus" relative to its standard rate of compensation. By contrast, the inquiry with respect to risk is whether an adjustment is necessary to ensure that the law firm is in fact "compensated at the full prevailing rate" for the specific risk-bearing services it agreed to provide. As explained above, risk-sharing AFAs suggest that the answer to that question is yes.

E. *Third-Party Litigation Funding*

Like the law firms in the previous contexts, a lender engaged in third-party litigation funding ("TPLF") provides risk-bearing services in connection with litigation.[257] TPLF refers to an arrangement in which an outside entity (i.e. neither a party nor counsel for a party) "finances the party's legal representation in anticipation of making a profit."[258]

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[254] *Id.* at 556-57.

[255] *Id.* (emphasis in the original).

[256] As discussed *supra* Part I.B., some types of risk can be overcome by superior performance, but others cannot.

[257] This form of lending is also known as alternative litigation finance, or "ALF." *See, e.g.*, J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 246 (2017) (using the terms interchangeably).

[258] Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388, 392 (2016). The lender "could be a bank, hedge fund, insurance company, or some other

Particularly relevant here, one form of TPLF involves plaintiff-side, case-specific, nonrecourse loans.[259] In this type of loan, if the case results in no recovery, the borrower owes the lender nothing;[260] but if the plaintiff prevails, the lender recovers the initial investment plus a substantial fee.[261] The TPLF provider does not represent the plaintiff as legal counsel; it will not draft a complaint, file motions, or appear in court on her behalf.[262] Instead, the lender funds the plaintiff's case and assumes the risk of loss. It thus provides *only* the risk-bearing services typically provided by a law firm in a statutory fee-shifting case (or in a common-fund or contingent-percentage-fee case.)[263]

"Legal claims are notoriously difficult to value,"[264] and the expected value of the claim is central to the value of the TPLF transaction.[265] Accordingly, these funders engage in a significant amount of due

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entity or individual." *Id.* I do not discuss here other potential forms of litigation finance, including consumer lending, in which individual plaintiffs receive direct loans to cover living costs pending an expected recovery. *See* STEVEN GARBER, RAND CORPORATION, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS 9-12 (2010).

[259] Engstrom, *supra*, at 394 (emphases in the original). I focus on plaintiff-side lending because it is most relevant to the question of compensation for risk in statutory fee-shifting cases, in addition to being where most TPLF activity has occurred. *See* Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011) (noting that TPLF has largely been aimed at plaintiffs, though there is a trend toward making it available to corporate defendants).

[260] The borrower can be either the plaintiff or her law firm. GARBER, *supra* note 258, at 15-16.

[261] Engstrom, *supra*, at 394-95. Both TPLF and statutory fee-shifting representation involve a nonrecourse loan of some sort: A TPLF provider loans the recipient money to cover the attorneys' fees and/or direct costs of the litigation, and a law firm representing a fee-shifting plaintiff "loans" the client both its attorneys' labor and the direct costs of the litigation. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 567 (2007) ("The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.").

[262] To the contrary, "in most states within the United States, lawyers must keep their distance somewhat from the funder." Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 875 (2015).

[263] Engstrom, *supra*, at 395; *see also* Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1160 (2015) ("[W]hile contingency lawyers do provide financing, they primarily provide lawyering services. . . . . Conversely, funders are financiers only.").

[264] Steinitz, *supra* note 263, at 1171.

[265] *See Panel 1: Litigation Funding Basics*, 12 N.Y.U. J.L. & BUS. 511, 515-18 (2016) (comments of Lee Drucker, co-founder of third-party lender Lake Whillans).

diligence before taking on any particular case.[266] In at least some instances, the due diligence process determines not only whether the lender will agree to fund the litigation, but also what rates it will charge. As funder Bentham IMF puts it, "returns vary by the deal."[267] Similarly, funder Burford Capital states that its transactions are "individually negotiated."[268] It notes that those transactions "often entitle [Burford] to the return of our invested capital, a minimum return on that capital, and a portion of the total proceeds of the litigation."[269] The TPLF market thus provides some support for a case-specific approach to compensation for risk in federal statutory fee-shifting cases.

To be clear, I am not arguing that TPLF lenders are interested in financing statutory fee-shifting litigation. I assume that, like profit-motivated law firms,[270] they will be highly unlikely to do so unless the case also happens to involve a large potential monetary recovery.[271] But these lenders focus on complex cases, and Congress intended that statutory fee-shifting awards should "be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature."[272] It is therefore reasonable to look to TPLF for insights about the value of risk-bearing services in statutory fee-shifting cases. Moreover, TPLF represents a conceptually useful unbundling of compensation for risk: Start with the services typically provided to a statutory fee-shifting plaintiff, subtract the services typically provided to a client under standard hourly billing, and what you have left over is essentially TPLF.

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[266] Burford Capital, for example, states that "[d]oing our own diligence is core to our business model," and that its "Investment Committee alone has more than 300 collective years of commercial litigation experience." Burford Capital, *What Does Burford Do?*, https://www.burfordcapital.com/faqs/ (last visited Oct. 9, 2019).

[267] Bentham IMF, *Generating Multi-Million Dollar Revenues with Funding*, https://www.benthamimf.com/funding/case-studies/case-study/generating-multi-million-dollar-revenues-with-funding (last visited Oct. 9, 2019).

[268] Burford Capital, *What Does Burford Do?*, *supra* note 266.

[269] *Id.*

[270] *See supra* Part II.D.

[271] *Cf.* Yeazell, *supra* note 29, at 204 (describing a TPLF provider that "wishe[d] at all costs to avoid plaintiffs who are litigating 'on principle,' rather than on the basis of maximizing cash recovery").

[272] Blum v. Stenson, 465 U.S. 886, 893 (1984) (quoting S.Rept. No. 94–1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5913).

In sum, TPLF further demonstrates that the market assigns value to risk-bearing services associated with litigation. Moreover, the cost of those risk-bearing services depends on case-specific factors, at least some of the time.

IV. EVALUATING THE ALTERNATIVES

The previous Part found that state fee-shifting awards, contingent percentage fees, common-fund awards, alternative fee arrangements ("AFAs"), and third-party litigation funding ("TPLF") provide support for the proposition that statutory fee-shifting awards should include case-specific compensation for risk. This Part analyzes specific methods that courts could use to provide that compensation. The analysis draws on the logistics of those other mechanisms, but it also recognizes the need to avoid the market gaps they reflect, especially with respect to cases that involve only injunctive relief or relatively low amounts of damages.

A. *Stage-Specific Risk Multipliers*

Risk is generally not uniform over the timeline of a particular case. A claim's probability of success changes continuously, but with reasonably predictable inflection points, including after a motion to dismiss, motion for summary judgment, or trial. Once a claim has survived a motion for summary judgment, for example, it will generally have a higher likelihood of success than it did at the time it was filed.[273] This lack of uniformity over time raises the question whether courts should apply different risk multipliers for work performed at different stages of a particular case.

The contingent percentage fee might at first appear to support an affirmative answer to that question, because some private-market contingency arrangements make the percentage rate dependent upon the point at which the litigation is resolved.[274] For example, a retainer agreement might provide for counsel to receive 40% of the recovery if the case goes to trial, 33% of a recovery obtained after the denial of a motion to dismiss, or 25% of a recovery obtained at an earlier phase. That structure, however, primarily reflects that earlier-resolving cases generally require counsel to work fewer overall hours than later-

[273] On the one hand, this higher likelihood of success might increase the plaintiff's bargaining position with respect to both merits relief and attorney's fees. On the other hand, the defendant might be in a position to respond by making a sacrifice offer or engaging in strategic capitulation. *See supra* Part I.A.

[274] *See supra* note 216.

resolving cases. Because the lodestar already accounts for the number of hours spent on a case, the logic of stage-specific contingent percentage fees does not shed light on the appropriateness of stage-specific risk multipliers for statutory fee-shifting awards.

Making the multiplier uniform across the duration of the litigation, as opposed to applying different multipliers for different stages, finds some justification in the commitment a law firm makes to a fee-shifting client when taking on the representation. Because the purpose of fee-shifting statutes is to enable plaintiffs with valid claims to find competent representation, risk is properly viewed on an ex ante basis; that is, from the standpoint of a law firm deciding whether to represent a claimant.[275] At that point, the firm may have an initial estimate of the claimant's likelihood of success, but it does not yet know what will happen at later stages of the litigation. If the firm accepts the representation, it nonetheless agrees to see the whole thing through, not to abandon the client while the litigation remains ongoing.[276]

Because of the under-compensatory status quo, an abandoned fee-shifting client would likely face tremendous difficulty finding new counsel.[277] Imagine what would happen, though, if statutory fee-shifting were working well. Under those circumstances, for-profit counsel would be more interested in representing fee-shifting claimants, and one firm's abandonment of such a claimant might lead to another firm stepping in. When a law firm entered a case at some post-filing stage of the litigation, it would likely make sense for the fee-shifting award to reflect the risk as it appeared at that later point in time.[278] This analysis suggests that stage-specific risk multipliers might be appropriate for statutory fee-shifting awards.

The best argument against stage-specific multipliers sounds in administrability and predictability. As noted previously, when it rejected compensation for risk, the Supreme Court expressed concern that risk enhancements "would make the setting of fees more complex

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[275] *Cf.* Osbeck, *supra* note 16, at 48 ("[O]utcome prediction is an important part of the initial case assessment that takes place before an action is originated.").

[276] Ethical rules limit the circumstances under which an attorney can terminate representation. *See, e.g.,* Model Rules of Professional Conduct 1.16(b).

[277] Unless, that is, the claim involved a sufficient amount of monetary relief to attract counsel under a contingent percentage-fee arrangement. *See supra* Part II.D.

[278] Analogously, a TPLF lender that invests at a post-filing stage of litigation presumably conducts due diligence with respect to the current state of the claims, rather than pretending to be ignorant of the current level of risk. *See supra* Part III.E.

and arbitrary, hence more unpredictable, and hence more litigable."[279] To the extent that this concern has any validity for a case-specific approach,[280] it carries greater force for a stage-specific approach. The latter would require a court both to assign multiplier values to the risk presented at multiple stages of the case, and to disaggregate the lodestar into the amounts associated with each of those stages.[281] Administrability and predictability thus weigh against determining and applying different multipliers for every stage of fee-shifting litigation.[282]

Two stages seem sufficiently distinct from the rest of the litigation process, however, to justify the hit to administrability and predictability. The first is merits appeals. Appellate work is in some ways more specialized and compartmentalized than the different stages of trial work, suggesting that applying an appellate risk multiplier would be both warranted and feasible. Moreover, depending on the standard of review and the party in whose favor judgment was entered, the appeal may involve more or less risk to the plaintiff than the trial-court proceedings. Consider the following analysis by the Oregon Court of Appeals:

> Appellate work is not identical to trial work. As the prevailing party at trial and the respondent on appeal, plaintiffs were entitled to certain favorable standards of review. The prosecution of the case at trial was more risky than the defense of the judgments on appeal. In addition, plaintiffs' efforts in arguing from a closed record on appeal cannot be equated with their efforts in creating that record at trial.[283]

The court thus awarded the plaintiffs a multiplier of 1.6 for work done on appeal, notwithstanding that they received a multiplier of 2.25 for

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[279] City of Burlington v. Dague, 505 U.S. 557, 566 (1992).

[280] *See supra* notes 194-196 and accompanying text (noting that the Florida Supreme Court has rejected this concern as unsupported); *see also infra* Part IV.B.2 (proposing an approach to case-specific multipliers designed to minimize this concern).

[281] If uniform (as opposed to case-specific) multipliers were used for different stages of litigation, part of the calculation would be simplified. *See infra* Part IV.C. The need for stage-specific disaggregation of the lodestar, however, would remain.

[282] Mortgage payments offer a useful analogy; the lender's risk decreases as the borrower's equity goes up and the number of remaining payments goes down, but making the interest rate vary with those factors would introduce unwarranted complexity.

[283] Strawn v. Farmers Ins. Co. of Oregon, 226 P.3d 86, 96 (Or. Ct. App. 2010).

work performed in the trial court.[284] It would seem appropriate, at least in some circumstances, for federal fee-shifting plaintiffs to receive a different multiplier for appellate work as well.

The second sufficiently distinct stage of litigation involves post-decree monitoring and enforcement. A judgment does not automatically result in changed conditions on the ground, so after a court enters an injunction or consent decree, plaintiffs' counsel will often need to take further steps to ensure the defendant's compliance.[285] In a fee-shifting case, those monitoring and enforcement activities will often be compensable. To the extent that liability has been finalized, however, those activities involve far less risk of nonpayment than work performed in earlier stages of litigation.[286] Moreover, the nature and timing of monitoring and enforcement should make the disaggregation of those hours from pre-judgment and appellate work relatively straightforward. Accordingly, applying a distinct multiplier to these compliance activities seems appropriate as well.

In sum, courts should not vary the risk multiplier for a particular case through judgment. It would be reasonable, however, to apply different multipliers for the appellate and post-decree compliance stages than for the pre-judgment phases.

B. *Case-Specific Risk Multipliers*

The question whether risk multipliers should be stage-specific (such that more than one multiplier would apply within any given case) is distinct from the question whether they should be case-specific (such that they would vary with the degree of risk presented by each particular case.)[287] As noted previously, the risk-bearing contexts discussed in Part III counsel in favor of case-specific variations in compensation for risk.

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[284] *Id.* The trial work was compensated pursuant to the common-fund doctrine, while the appellate work was compensated pursuant to a fee-shifting statute. *See id.* at 93.

[285] *See* Schlanger, *supra* note 167, at 74.

[286] *Id.* at 74 & n.2.

[287] A further question, which is beyond the scope of this Article, is whether risk multipliers should apply to costs as well as the lodestar. For a discussion of cost multipliers in the context of common-fund awards, see Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DEPAUL L. REV. 587, 609-11 (2014).

When calculating federal statutory fee-shifting awards, I propose that courts apply case-specific risk multipliers based on an estimate of the ex ante probability of complete success, as follows:[288]

Ex ante probability of complete success	Risk multiplier
20%	3.5
40%	2
60%	1.5
80%	1.25

Table 1: Proposed Approach to Risk Multipliers

This proposal, and the reasoning that it reflects, is discussed in more detail below.

1. Range of multiplier values

The proposal entails that no case would receive a risk multiplier higher than 3.5. The imposition of a ceiling responds to concerns raised in the state fee-shifting and federal common-fund contexts, where courts have recognized the absurdity that could result if the risk multiplier were permitted to scale up indefinitely.[289] To see why, imagine a case that had a one-in-a-thousand chance of success at the time it was filed, because it both argued for the reversal of existing precedent and appeared to depend on the credibility of an unsympathetic witness. The case might ultimately succeed due to a perfect storm of events favorable to the plaintiff, such as unexpected personnel changes on the Supreme Court (resulting in a dramatic shift in the viability of the plaintiff's legal contentions) and the unexpected discovery of compelling evidence (resulting in a dramatic shift in the viability of the plaintiff's factual contentions). If there were no upper bound on the risk enhancement, a court might award a multiplier in

[288] For accessibility purposes, I note that the table describes a risk multiplier of 3.5 for cases with a 20% ex ante probability of complete success, a risk multiplier of 2 for cases with a 40% ex ante probability of complete success, a risk multiplier of 1.5 for cases with a 60% ex ante probability of complete success, and a risk multiplier of 1.25 for cases with an 80% ex ante probability of complete success.

[289] For example, the Seventh Circuit has argued that "the logic of scaling the fee to the risk leads to absurdity if pressed too hard: it would justify an astronomical fee in a frivolous suit in which the plaintiff prevailed by a fluke." In re Trans Union Corp. Privacy Litig., 629 F.3d 741, 746 (7th Cir. 2011). One can agree with this general idea without accepting that a case can be deemed frivolous even if the plaintiff prevails.

the neighborhood of 1,000 upon the plaintiff's success,[290] which could result in a truly astronomical fee.

The proposed multiplier values (3.5, 2, 1.5, and 1.25) are broadly similar to those prevailing in common-fund cases.[291] "Empirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1–2 range."[292] The floor is somewhat lower in common-fund cases, as some fee awards fall "at or just below counsel's lodestar."[293] The ceiling is also somewhat higher, as dozens of reported cases involve multipliers greater than 3.5,[294] and some cases involve multipliers greater than 6.[295]

The multipliers awarded in federal common-fund cases tend to be higher than those awarded under state fee-shifting statutes. In connection with the latter, for example, the Supreme Court of Florida has authorized multipliers up to 2.5.[296] For their part, the New Jersey and Hawaii Supreme Courts have imposed a ceiling of 2 (i.e. doubling) for risk multipliers under their state fee-shifting statutes,[297] at least in

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[290] *But see infra* Part IV.B.4 (noting that case-specific multipliers need not be set at the exact inverse of the initial likelihood of success).

[291] For a discussion of the common-fund doctrine, see *supra* Part III.C.

[292] Rubenstein, 5 Newberg on Class Actions § 15:87 (5th ed. 2019). Much of the empirical research in this area focuses on cases in which courts calculate the lodestar and compare it to the percentage amount as a "cross-check." *See id.*; *see also* Eisenberg & Miller, *supra* note 225, at 267 (explaining that "[i]f the percentage fee grossly exceeds the lodestar amount, the fee may be deemed excessive, and the courts can adjust the fee downward to a more reasonable range"). One study found a mean lodestar multiplier of 1.48 (i.e. an average 48% increase over the lodestar amount), Eisenberg et al., *supra* note 225, at 965; another found a mean lodestar multiplier of 1.65, Fitzpatrick, *supra* note 225; and another found a mean lodestar multiplier of 1.81, Eisenberg & Miller, *supra* note 225, at 272.

[293] William B. Rubenstein, 5 Newberg on Class Actions § 15:89 (5th ed. 2019).

[294] *Id.*

[295] *See* Fitzpatrick, *supra* note 225, at 834.

[296] *See* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 834 (Fla. 1990) ("If the trial court determines that success was more likely than not at the outset, it may apply a multiplier of 1 to 1.5; if the trial court determines that the likelihood of success was approximately even at the outset, the trial judge may apply a multiplier of 1.5 to 2.0; and if the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5."); *see also* Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122, 1123 (Fla. 2017) (reaffirming *Quanstrom*).

[297] Rendine v. Pantzer, 661 A.2d 1202, 1231 (N.J. 1995); Schefke v. Reliable Collection Agency, Ltd., 32 P.3d 52, 100 (Haw. 2001).

non-class cases.[298] That ceiling strikes me as far too low; at most, it would create a financial incentive only for those cases in which the law firm can be perfectly confident, before taking on the representation, that the plaintiff is more likely than not to prevail. It would thus leave out many cases that would ultimately succeed, including most of those seeking meaningful changes in the law.

Some alternative fee arrangements (AFAs) and third-party litigation funding (TPLF) agreements also involve multiplier-like mechanisms, but the details of those transactions are rarely made public. That opacity makes it difficult to draw on the AFA and TPLF contexts for specific insights into appropriate multiplier values in federal fee-shifting cases.[299] Some public information, however, suggests that the proposed multiplier values might be somewhat similar to TPLF rates. Specifically, a 2009 lawsuit revealed that a law firm "agreed to pay back [TPLF lender Augusta Capital] not only the funded litigation expenses, but also a stipulated funding fee which ranged from 75% to 125% of the funded amount."[300] That fee would roughly correspond to a 1.75 to 2.25 multiplier value.

2. Relevant factors

To determine which of the proposed multiplier values to apply, a court would begin by estimating the ex ante probability that the case

[298] Some lower courts in New Jersey have applied higher multipliers when issuing fee-shifting awards in class actions. *See* Bruce D. Greenberg, *Attorneys' Fees in New Jersey Class Actions*, N.J. LAW., April 2015, at 94, 96. Doing so could have a positive effect on plaintiffs' incentives to pursue class treatment, especially in injunction-only cases. *See* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2079-81 (2015).

[299] Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1900 (2013) ("The nascent third-party funding industry lacks transparency, and the content of funding agreements, in particular, is highly guarded proprietary information."); *see also* Matthew Bultman, *3rd-Party Funding Finding A Home In Patent Litigation*, LAW 360 (Sept 29, 2017), https://www.law360.com/articles/959672/3rd-party-funding-finding-a-home-in-patent-litigation ("It's difficult to pinpoint how many patent cases involve third-party funders because the deals are often kept under wraps with nondisclosure agreements.").

[300] Augusta Capital, LLC v. Reich & Binstock, LLP, No. 3:09-CV-0103, 2009 WL 2065555, at *1 (M.D. Tenn. July 10, 2009); *see also* Panel 1: Litigation Funding Basics, 12 N.Y.U. J.L. & Bus. 511, 528 (2016) (comments of John Desmarais, contingent-fee attorney) (describing agreements Desmaris has seen in which the funding company will receive "a return of either twice their money or three times their money from the first dollars from any settlement").

would succeed in full, as viewed from the standpoint of a reasonable attorney deciding whether to accept the representation.[301] Although a court would make this estimate after the merits case had ended, it should consider only the information that would have been available after a reasonable pre-filing investigation.[302] Moreover, to avoid inviting duplicity or creating conflicts of interest for plaintiffs' counsel,[303] the estimate should be based on relatively objective factors that (at the time of the fee petition) no longer affect the merits. Those case-specific factors could include the following:

- the expertise and capital required for successful prosecution of the claims;[304]
- the existence and outcome of prior cases, if any, involving similar claims against this defendant;[305]

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[301] *Cf.* Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122, 1133 (Fla. 2017) (state fee-shifting case) ("[T]he lodestar amount, which awards an attorney for the work performed on the case, is properly analyzed through the hindsight of the actual outcome of the case, whereas the contingency fee multiplier, which is intended to incentivize the attorney to take a potentially difficult or complex case, is properly analyzed through the same lens as the attorney when making the decision to take the case."); Fischel v. Equitable Life Assur. Soc'y of U.S., 307 F.3d 997, 1009 (9th Cir. 2002) (common-fund case) ("We hold that risk should be assessed when an attorney determines that there is merit to the client's claim and elects to pursue the claim on the client's behalf. This will likely occur before a lawsuit is filed."). If stage-specific multipliers are used, *see supra* Part IV.A, the viewpoint would be that of a reasonable attorney deciding whether to enter the lawsuit at the beginning of the relevant stage.

[302] The probability determination should reflect that, if the available information would make a reasonable attorney doubt her ability to evaluate the case's likelihood of success, her willingness to take on the case would be correspondingly diminished. Attorneys often do have such doubts, as demonstrated by the rise of technologies like quantitative legal prediction. *See generally* Daniel Martin Katz, *Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013). At some point, those technologies might prove useful to the calculation of risk multipliers, but they are not yet reliable enough to serve that purpose. *See* Jason Tashea, *Algorithms Fall Short in Predicting Litigation Outcomes*, ABA JOURNAL (Sept. 2018).

[303] *See supra* notes 121-123 and accompanying text (discussing these concerns).

[304] *See supra* Part III.B (discussing the role of expertise and capital in case selection decisions in contingent-percentage-fee practice); *see also* Ashley Keller & Katharine Wolanyk, *What You Need To Do Before Obtaining IP Litigation Financing*, http://www.burfordcapital.com/newsroom/need-obtaining-ip-litigation-financing/ (last visited Oct. 9, 2019) ("Demonstrated expertise and capacity to handle the contemplated campaign matter greatly to [TPLF] providers . . . .").

[305] *Cf.* Keller & Wolanyk, *supra* note 304 (noting that prospective borrowers should be prepared to inform a TPLF provider about "any relevant prior litigation").

- the degree of legal uncertainty, with respect to both claims and defenses;[306]
- the legal and factual complexity of the case;[307]
- the defendant's likely willingness to engage in scorched-earth litigation tactics, as suggested by the importance it attaches to the underlying issues;[308]
- whether other law firms declined to represent the plaintiff;[309] and
- how often defendants prevail outright in cases brought under the same substantive law.[310]

It bears emphasis that this inquiry can produce only an estimate. As discussed below, complete precision is unachievable, and courts should not pretend otherwise.

3. Quantization of probability values

The proposed approach would not require a court to identify the risk presented by the case with mathematical exactitude. Instead, a court would choose which of the four buckets most accurately reflects the litigation's ex ante probability of complete success. Multiple benefits flow from this quantization. First, because evaluation of this type of ex ante litigation risk is extremely difficult,[311] attempts at fine-

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[306] *See, e.g.,* notes 8-13 and accompanying text (discussing District of Columbia v. Heller, 505 U.S. 557 (1992) (federal fee-shifting case)).

[307] *See, e.g., Joyce*, 228 So. 3d at 1134 (state fee-shifting case) (discussing these factors).

[308] *See, e.g.*, State Farm Fire & Cas. Co. v. Palma, 555 So. 2d 836, 838 (Fla. 1990) (state fee-shifting case) (deeming it relevant to the risk assessment that the defendant was willing to "go to the mat" because of the importance of the underlying issue to its broader business interests).

[309] *See, e.g.,* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 958 (7th Cir. 2013) (common-fund case) ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices.").

[310] *See e.g.*, *id.* at 958 (common-fund case) (deeming it relevant to the risk assessment that "[d]efendants prevail outright in many securities suits").

[311] *See* Osbeck, *supra* note 16, at 41 ("[N]otwithstanding its enormous importance to the practice of law (and notwithstanding the handsome legal fees it commands), outcome prediction in the law remains a very imprecise endeavor."). *Cf. supra* notes 264-269 and accompanying text (discussing the difficulty of claim valuation for purposes of TPLF investments).

grained accuracy would entail a high cost to judicial economy.[312] In addition, limiting the options mitigates the concern that case-specific risk enhancements "would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable."[313] Choosing among four buckets is less expensive, in terms of judicial economy and predictability, than choosing among the full range of probability values.

At the same time, limiting the number of risk-multiplier options also has costs. Most significantly, it would reduce the court's flexibility to make the multiplier value reflect the risk associated of the particular case, and it might increase the imprecision involved in the risk evaluation, because some cases will not have an ex ante probability of complete success that falls at one of the predetermined points. The proposal reflects a balance between these concerns about flexibility and precision, on the one hand, and concerns about administrability and predictability, on the other.[314]

Most of the cases in which courts issue federal statutory fee-shifting awards would likely fall into the 40% or 60% buckets. Few plaintiff-side law firms are in a position to be truly risk neutral rather than risk averse, making them unlikely to bring many cases in which they have only a 20% likelihood of success. Similarly, few defendants are in a position to be truly risk neutral rather than risk averse, making them likely to try to settle cases in which they have an 80% likelihood of failure (especially because, by settling at an early stage of the litigation, they can constrain the plaintiff's lodestar value). The other buckets would thus have less of an impact on court-ordered fee-shifting awards than on the settlement negotiations that occur in the shadow of the law. In the latter context, the 20% and 80% buckets would act like guideposts, limiting the parties' leverage to seek multipliers above 3.5 or below 1.25.

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[312] To see why, consider the extensive due diligence that TPLF providers conduct when deciding whether to fund a case. Burford Capital, for example, reports that its due diligence process "typically takes at least 60 days." Keller & Wolanyk, *supra* note 304. Requiring a similar level of analysis for purpose of setting a risk multiplier would place a heavy burden on courts and litigants.

[313] *Dague*, 505 U.S. at 566.

[314] Increasing the number of buckets would shift this balance to favor greater flexibility and precision, while decreasing the number of buckets would shift the balance in favor of greater administrability and predictability. Reducing the number of buckets to one would be equivalent to a uniform risk multiplier approach, discussed *infra* Part IV.C.

4. Expected value of overall fee

Some courts and commentators have assumed that a case-specific approach would invariably require setting the multiplier to the exact inverse of the risk presented by a particular case.[315] In keeping with that assumption, some have raised concerns that a case-specific approach would create the same incentive for attorneys to bring high-risk cases as low-risk ones.[316] As the proposed approach reflects, however, case-specific multipliers need not create those incentives. Instead, the proposal entails that the lowest-risk cases would have the highest expected-value fees, as viewed from the perspective of a law firm deciding whether to take on the case:[317]

Ex ante probability of complete success	Risk multiplier	Expected value of representation
20%	3.5	70% of lodestar
40%	2	80% of lodestar
60%	1.5	90% of lodestar
80%	1.25	100% of lodestar

Table 2: Expected Value Associated with Each Probability and Multiplier Value

When a law firm will be paid only upon success, it must consider not only the fee that could result from a potential representation, but also

[315] *See supra* Parts II.B-C. For example, under an exact-inverse approach, a case with a 20% chance of success would have a multiplier value of 5.

[316] *See* City of Burlington v. Dague, 505 U.S. 557, 562-53 (1992) (objecting that risk multipliers would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones"); *see also supra* notes 124-125 and accompanying text (noting that this objection assumes risk neutrality, rather than risk aversion, on the part of the law firm considering whether to represent the claimant).

[317] For accessibility purposes, I note that the table describes an expected value of 70% of the lodestar for cases with a 20% ex ante probability of complete success and a risk multiplier of 3.5, an expected value of 80% of the lodestar for cases with a 40% ex ante probability of complete success and a risk multiplier of 2, an expected value of 90% of the lodestar for cases with a 60% ex ante probability of complete success and a risk multiplier of 1.5, and an expected value of 100% of the lodestar for cases with an 80% ex ante probability of complete success and a risk multiplier of 1.25.

the likelihood of obtaining that fee.[318] The expected values listed in this table reflect the role the latter factor plays in case selection decisions.[319]

If a case were to have an ex ante probability of complete success greater than 80%, the 1.25 multiplier value would result in an expected value in excess of the lodestar.[320] The proposal assumes that such cases would be filed so rarely that courts could reasonably treat them as nonexistent.[321] More generally, the proposal reflects the conclusion that the risk multiplier should a floor as well as a ceiling,[322] because "no claim has a 100% chance of success"[323] and risk-bearing services have positive value. If it were discovered that law firms were routinely taking certain cases on contingency while charging only their standard non-contingent rates (or while charging a total fee amounting to less than 125% of those standard rates), the lower bound could be waived or lowered in cases of that type.

In cases with less than an 80% ex ante probability of complete success, these multiplier values would be insufficient to make a risk-neutral law firm indifferent to the risk presented by the particular case, as the third column of this chart suggests. Put differently, law firms would have a greater incentive to take on higher-probability cases than to take on lower-probability cases. The below-lodestar expected values associated with the other three buckets, under which law firms would

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[318] *See supra* Part III.B.

[319] This table reflects two simplifying assumptions. First, the expected-value calculation assumes that cases can only completely succeed or completely fail. *See supra* note 127. Second, it treats the lodestar as a value that does not depend on a case's likelihood of success. *See supra* Part I.B.

[320] For example, if a case had a 90% probability of success, the expected value of the fee would be L * 0.90 * 1.25 = 1.125L, or 112.5% of the lodestar. (This calculation uses the same simplifying assumptions discussed *supra* note 319.)

[321] *Cf.* J.B. Heaton, *The Siren Song of Litigation Funding*, 9 MICHIGAN BUSINESS & ENTREPRENEURIAL L. REV. (forthcoming 2020) ("There are, to put it simply, an overwhelming number of ways that litigants can lose and far fewer paths to significant victories. . . . . Even in the best of circumstances, one can probably rarely reach a level of certainty as high as 80% on a litigation outcome, and certainty that high should be rare indeed.").

[322] For a discussion of the appropriateness of a ceiling, *see supra* Part IV.B.1.

[323] *Dague*, 505 U.S. at 563. *Cf. id.* at 565 (arguing that contingency enhancements, if adopted, could not "be restricted to fewer than all contingent-fee cases"); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 725 (1987) (plurality opinion) ("Because it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case.").

have a greater financial incentive to represent paying clients than to represent fee-shifting clients, are the price of those incentives. The expected values reflect not only a concession to concerns about encouraging high-risk claims,[324] but also a recognition of the federal judiciary's general parsimony when it comes to compensating plaintiffs' counsel.[325]

The proposed approach would thus represent a dramatic improvement over the status quo, but it would still involve some degree of under-compensation. Claimants would still have to rely on public-spiritedness to fill in the gaps, and some would still be left without representation, even though they would have prevailed if representation had been available. Unless courts are willing to accept the costs of exact-inverse multipliers, however, they will have to "acknowledge that a predictable number of babies are inevitably going to get thrown out along with all that bath water."[326]

C. *Uniform Risk Multipliers*

A uniform multiplier, set in advance and applicable to one or more specified fee-shifting statutes, would address many of the concerns expressed by the Supreme Court in *Dague*.[327] Such a multiplier would be very straightforward to add to the existing lodestar approach,[328] requiring only that courts multiply the lodestar by a predetermined number.[329] Moreover, unlike a multiplier set to the exact inverse of the

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[324] *See supra* Part II.C; *see also* Hylton, *supra* note 25, at 1115-16 (arguing that, because subsidization increases the volume of the subsidized activity, case-specific risk multipliers would lead to an increase in the filing of "risky claims" of a similar type).

[325] *See supra* Part II.D; *see also* Fitzpatrick, *supra* note 225, at 834 (describing lodestar multipliers in common-fund cases as "fairly parsimonious for the risk that goes into any piece of litigation").

[326] Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 68 (1996) (making this assertion in connection with Rule 11 of the Federal Rules of Civil Procedure).

[327] *See supra* Part II.C.

[328] To be sure, the process of determining the hours-worked and hourly rate components of the lodestar can be far from straightforward, but the process of applying one predetermined multiplier to the lodestar would be trivially easy. If courts were to apply different multipliers to different fee-shifting statutes (or types of claims,) greater complexity would be involved in cases that involved more than one of those statutes (or types of claims.)

[329] *Cf. Dague*, 505 U.S. at 566 (objecting that risk multipliers "would make the setting of fees more complex and arbitrary, hence more unpredictable").

case's likelihood of success, it would preserve law firms' greater incentives to take cases with less apparent risk than to take cases with more apparent risk.[330] A uniform multiplier would also avoid arbitrariness in distinctions among cases, and (for those cases commenced after the multiplier value was announced) it would avoid the uncertainty for parties and their counsel that could result from a case-specific approach.[331]

The Court in *Dague* objected that a uniform multiplier could not effectively "mirror[] market incentives,"[332] and notwithstanding the opinion's flaws, that particular aspect of the Court's reasoning has been borne out: The contexts examined in Part III support the proposition that the market value of risk-bearing services depends on case-specific factors. Nevertheless, if courts will either adopt uniform multipliers or provide no compensation for risk at all,[333] then uniform multipliers seem warranted. Because fee-shifting statutes are designed to fill a market *gap*, absolute fidelity to the private market is not possible.[334] Instead, as the Seventh Circuit once put it, "the best we can hope for in awarding attorney's fees is rough justice."[335] Because perfection is unachievable, the real question is how to allocate the costs of imprecision.[336]

As between adopting a uniform multiplier or prohibiting compensation for risk, each choice involves foreseeable errors. A uniform multiplier would cause defendants to bear the cost of over-

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[330] *Cf. Dague*, 505 U.S. at 562-63 (objecting that risk multipliers would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones"). *But see supra* Part I.A (noting the possibility of sacrifice offers and strategic capitulation, which can disrupt the connection between probability of success and probability of fee eligibility).

[331] For further discussion of the value of a uniform multiplier, see Rowe, *supra* note 25, at 632; Leubsdorf, *supra* note 30, at 501-04.

[332] *Dague*, 483 U.S. at 564-65.

[333] *Cf.* Rowe, *supra* note 25, at 633-34 (objecting to using "criticisms of *one way* of handling contingency enhancements as grounds for not allowing them *at all*").

[334] *See Dague*, 505 U.S. at 566-67 ("It is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect.").

[335] Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 637 (7th Cir. 2011).

[336] *Cf.* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 Denv. U. L. Rev. 287, 302 (2010) (arguing, in the context of the Federal Rules of Civil Procedure, that "[s]ince perfect accuracy is impossible, the only sensible goal is to achieve optimal accuracy, or more precisely, an optimal risk of outcome error").

compensation in a subset of statutory fee-shifting cases, and it would encourage more of those cases to be brought, if some cases involved less risk than the multiplier would reflect. In the remaining cases, a uniform multiplier would cause plaintiffs to bear the cost of under-compensation, and it would cause fewer of those cases to be brought, if some cases involved more risk than the multiplier would reflect. By contrast, prohibiting compensation for risk causes plaintiffs to bear the cost of under-compensation in *all* federal statutory fee-shifting cases, because all cases involve some degree of risk.[337] Making this choice so as not to allocate all of the costs to the plaintiff—the "prevailing party" in the litigation, and "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority"[338]—seems like the far better option.[339] From a cost-allocation standpoint, uniform multipliers would thus be superior to a prohibition on compensation for risk.

[337] *Id.* at 563; *see also supra* note 15 and accompanying text.

[338] Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 418 (1978).

[339] Charles Silver has made a compelling argument to this effect:

> The price of avoiding the problem completely, which Justice Scalia accomplished [in *Dague*] by eliminating contingency enhancements, is to place all victims who have only fee awards to offer at a disadvantage in the competition for lawyers' time. Why is it better to pay that price than to require defendants found guilty of violating federal laws to pay marginally more in fees than the risk of nonpayment warrants? Why should the interest guilty defendants have in saving money trump the interest plaintiffs with meritorious claims have in retaining counsel? Guilty defendants can often avoid liability for fees entirely by refraining from wrongful conduct. Those who fail to do so have little standing to complain. Guilty defendants can also protect themselves by making offers of judgment, lump-sum settlement offers, and settlement offers that waive, reduce, or cap their liability for fees. Again, it is hard to work up much sympathy for defendants who let these opportunities slip by. Finally, the primary purpose of fee award statutes is to help plaintiffs with meritorious claims obtain relief from guilty defendants. It is therefore better to construe the statutes in a manner that creates incentives for lawyers to represent plaintiffs who have sufficiently strong claims than to worry about protecting defendants who violate federal laws from marginal overpayments.

Silver, *Incoherence and Irrationality*, at 328–29.

The uniform multiplier could be set so as to encourage only those cases with a minimum likelihood of success. For example, John Leubsdorf once suggested that courts might "simply multiply all fee awards by two, on the theory that the promise of doubled fees would encourage the bringing of suits with at least an even chance of success."[340] Alternatively, the multiplier could be tied to plaintiffs' overall success rate in civil litigation over some specified period of time. Those success rates have hovered around 30% for the past two decades,[341] suggesting that this approach might result in a multiplier closer to 3. As a variation on this alternative, a set of uniform multipliers could be based on plaintiffs' success rates with respect to particular types of claims over some specified period of time. For example, plaintiffs won about 8.1% of adjudicated civil rights employment cases in 2016,[342] suggesting that this approach would result in a high multiplier value for that type of claim.

If courts want to be sure that all costs of imprecision fall on plaintiffs rather than defendants, they could achieve that result by setting the uniform multiplier at a point corresponding to the lowest possible level of risk. For the reasons explained previously,[343] a multiplier value of 1.25 is a reasonable candidate for that lower bound. While far from ideal, using this lower bound as a uniform multiplier would still be an improvement on the status quo, as it would provide reasonable compensation in the subset of cases involving the lowest level of litigation risk.

CONCLUSION

In a range of contexts—including state fee-shifting statutes,[344] private-market contingent percentage fees,[345] class action common-fund awards,[346] alternative fee arrangements,[347] and third-party litigation

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[340] Leubsdorf, *supra* note 30, at 474-75.

[341] Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1373 (2019).

[342] *Id.* at 1426.

[343] *See supra* Part IV.B.4.

[344] *See supra* Part III.A.

[345] *See supra* Part III.B.

[346] *See supra* Part III.C.

[347] *See supra* Part III.D.

funding[348]—courts and markets regularly provide compensation for risk-bearing services associated with plaintiff-side litigation. It is past time for courts to provide that compensation under federal fee-shifting statutes as well. This Article has proposed a means of doing so while attending to potential concerns about overpayment, perverse incentives, and judicial economy.[349] Accordingly, those concerns need not (and should not) result in the denial of compensation for risk altogether.[350]

[348] *See supra* Part III.E.

[349] *See supra* Part IV.

[350] *Cf.* Rendine v. Pantzer, 661 A.2d 1202, 1228 (N.J. 1995) (acknowledging "concerns about overpayment and double-counting" and concluding that those concerns should be "address[ed] . . . by the standards that we adopt to guide the award of contingency enhancements").