OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CITY OF BURLINGTON, Petitioner

V. ERNEST DAGUE, SR., ET AL.

CASE NO: 91-810

PLACE: Washington, D.C.

DATE: April 21, 1992

PAGES: 1 - 46

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IN THE SUPREME COURT OF THE UNITED STATES

- X

CITY OF BURLINGTON, :

Petitioner :

v. : No. 91-810

ERNEST DAGUE, SR., ET AL. :

- X

Washington, D.C.

Tuesday, April 21, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 p.m.

APPEARANCES:

MICHAEL B. CLAPP, ESQ., Burlington, Vermont; on behalf of the Petitioner.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

BARRY L. GOLDSTEIN, ESQ., Oakland, California; on behalf of the Respondents.

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P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-810, The City of Burlington v. Dague.

Mr. Clapp.

ORAL ARGUMENT OF MICHAEL B. CLAPP

ON BEHALF OF THE PETITIONER

MR. CLAPP: Thank you, Mr. Chief Justice, and may it please the Court:

The issue presented in this case is whether a district court, in determining a reasonable hourly fee, a reasonable fee award under Federal fee-shifting statutes, may enhance that award above the lodestar amount in order to reflect the fact that plaintiff's attorneys have taken the case on a contingent fee basis, thus assuming the risk of receiving no attorney's fees at all, and this case the district court denied a preliminary injunction motion and ultimately issued an order on the merits which denied all of the relief sought by the plaintiff and granted relief limited to the ratification of a preexisting state court order.

On that basis, when determining the reasonable attorney's fees to be awarded to the plaintiffs, the district court concluded to award the full lodestar amount and in addition a contingency bonus or enhancement to

reflect the fact that plaintiff's counsel had taken the case on a contingency basis.

The decision that the enhancement award was in order was based upon the bizarre conclusions that in the first place the plaintiff's loss of the preliminary injunction motion somehow entitled plaintiffs to be compensated at a greater rate, not only with respect to the effort expended with respect to the preliminary injunction motion and other claims that were lost, but with respect to all hours devoted to the case. Secondly, the court based its decision on its determination that plaintiff's attorney who brought and prosecuted the case with no guarantee of an enhancement was nevertheless entitled to the enhancement award.

This case, we submit, demonstrates an example of the Hensley lodestar method of fee calculation run amuck. Our response to the precise issue presented to the Court is first, no enhancement for a, of a lodestar fee to reflect risk of lost contingency should ever be granted, for the reason that any such award of an enhancement is necessarily speculative and contrary to the evidence of the market's response to risk of loss assumption as demonstrated by the evidence before the Court.

QUESTION: How about that it's contrary to the fee-shifting statute?

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MR. CLAPP: It's also -- for that reason, contrary --

QUESTION: Shouldn't you start with that?

MR. CLAPP: Well, the fee-shifting statute provides, of course, that fees should be reasonable, and this Court has determined on several occasions that --

QUESTION: It only provides for fees when you win --

MR. CLAPP: That's correct, Your Honor.

QUESTION: -- not when you lose.

MR. CLAPP: Precisely the point that we were raising with respect to the basis for this Court's determination, that it is absolutely bizarre --

QUESTION: And if you're getting enhanced when you win, you're getting enhanced and being paid for when you lose.

MR. CLAPP: That's correct.

QUESTION: That's just a plain old statutory question, isn't it?

MR. CLAPP: We would certainly contend that it was, Your Honor. The respondents, we anticipate, will argue that on the basis of economic theory that despite what the facts show the enhancement should be available in order to encourage the bringing of these types of lawsuits in general.

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QUESTION: And the arguments for both sides are pretty well set forth in the various opinions for the Court in the second Delaware case, aren't they?

MR. CLAPP: That's correct, Your Honor. The difficulty with the various opinions set forth in the Delaware case is that both -- that's a major problem, of course, but I will address my comments for the moment to --

QUESTION: Otherwise you wouldn't be --

MR. CLAPP: Otherwise we wouldn't be here today.

QUESTION: And you wouldn't be being paid to be here.

MR. CLAPP: That's correct. Very true.

(Laughter.)

MR. CLAPP: I would like to address my observations, if I could for a moment, to Justice O'Connor's concurring opinion and the dissenting opinion in Delaware Valley II. I would like to preface those remarks by pointing out that this Court determined in Delaware Valley I, or set forth in Delaware Valley I in Justice White's opinion, that the whole purpose for this Court's selection of the Hensley method of fee calculation was to avoid, was precisely to avoid the sort of arbitrary and capricious conclusion that enhancement of an otherwise reasonable lodestar fee presents.

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The difficulty, it seems to me, with both the concurring opinion and the dissenting opinion in Delaware Valley II is that neither of those opinions address the difficult issue that arises when a court attempts to venture beyond its role as a fact-finder and to begin enunciating policy.

QUESTION: Mr. Clapp, may I ask a question to show my ignorance of this whole area of the law? Where did the term lodestar come from in this context?

MR. CLAPP: Your Honor, I understand that the term lodestar was coined by the Third Circuit in its early development of the method of fee calculation that refers to a base of all hours expended on a case, reasonably expended on a case, times the reasonable hourly rate. Beyond that, I cannot explain the derivation of the term.

QUESTION: It always struck me as a strange kind of a term.

MR. CLAPP: It struck me as a strange term, too.

QUESTION: But it nevertheless was adopted by this Court, wasn't it?

(Laughter.)

MR. CLAPP: The term was adopted by this Court.

QUESTION: Well, we do do strange things.

MR. CLAPP: The method of --

QUESTION: Stare decisis, as they say.

MR. CLAPP: The method that is referred to by the term that was adopted by this Court was a modification of that Third Circuit approach that had been developed prior to that time.

QUESTION: In computing the lodestar, now that we know what it is, you do take market parses into account, do you?

MR. CLAPP: My understanding of that, Your Honor, is that the market determines what the reasonable hourly rate to be used in calculating the fee is.

QUESTION: What if an economist could convince us, and I probably couldn't, that the market is different in a free market when you're just charging clients and you don't have Government mixing into the thing, the market pays a little more when there's a contingency involved than it does when there's no contingency involved?

MR. CLAPP: Assuming that such evidence could be developed, then that evidence would simply be evidence of what the market rate is in that particular market.

QUESTION: And then it would indicate that the contingency factor would be reasonable, I guess, because within the higher --

MR. CLAPP: It would simply indicate that to whatever extent that market compensates for contingency, that figure is already reflected in the, in that market

hourly rate.

QUESTION: On the lode, because the lodestar assumed when it is worked out that there is a, that if there has been a contingency factor, it was taken into account in computing the lodestar?

MR. CLAPP: It was taken into account by the market in determining what the market rate was, and the courts should be limited to simply determining what that market rate is.

QUESTION: But it isn't the fact of contingency, is it? It's a question of how difficult the issue is and what kind of skill it takes to win.

MR. CLAPP: The definition of the risk of loss is complicated, Your Honor, and I would address that question specifically by saying whether, or the extent of the risk of loss in a particular case is a function not only of the complexity of the issues advanced, and to that extent the plaintiff controls that issue by the extent of the relief that is granted, or requested in a case like this.

QUESTION: Mr. Clapp --

MR. CLAPP: Yes, sir, Justice Blackmun.

QUESTION: I have a question. Perhaps I should direct it to your opposition, but isn't there a state law claim remaining in this case for which damages are

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available?

MR. CLAPP: There certainly is, Your Honor. There is a state law claim remaining on the face of the complaint for $1 million.

QUESTION: How does that affect the outcome of this argument?

MR. CLAPP: Well, assuming, Your Honor, that a rational support for fee enhancement, lodestar fee enhancement, could be constructed, I think amicus, the American Bar Association and this Court in other occasions has recognized that a fee arrangement between plaintiff and their counsel may have the effect of reducing whatever risk would otherwise be inherent in a particular case. Thus in this case, as we understand plaintiff's arrangement with their attorney, if the plaintiffs are successful in establishing a right to a fee award in this case, that will be the limit of the compensation that they receive. If they are not, plaintiffs will still be compensated on a percentage fee basis for any work that is performed in this case, assuming that they are successful in establishing their state related claims to damages.

QUESTION: Assume that we say that contingent fees are inappropriate and that the court is concluding a lodestar fee and the court hears expert witnesses or considers an affidavit, and the testimony is that in cases

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of this kind since recovery is uncertain the hourly rate is generally $50 an hour higher than other hourly rates. Should that be included in the lodestar amount?

MR. CLAPP: We think not, Your Honor. The market rate which should be used in calculating the lodestar is not a reflection of what a particular supplier in the market hopes to obtain. It should be, and we contend under the Hensley lodestar method, should reflect how the market compensates for those services, not, to repeat, what a particular attorney hopes to receive.

QUESTION: Well, what if the testimony is that this is how the market compensates for it?

MR. CLAPP: Then the market rate in that particular case would reflect the --

QUESTION: The $50 an hour increase?

MR. CLAPP: -- the $50 an hour increase.

QUESTION: Well then are we engaged in a circular enterprise no matter which way we rule?

MR. CLAPP: To the extent that the Court becomes involved in trying to parse the elements that a particular market rate reflects, my answer to Justice Kennedy's question would be that there is no need for the Court to get involved in that parsing. The market reflects whatever considerations the market considers in fixing a prevailing market rate.

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QUESTION: Well, should the market be defined as the market for attorney's fees generally and not just for fees of cases of this type, so that if you were the trial judge you'd ask a defense firm what they charge an insurance company by the hour and use that as the rate?

MR. CLAPP: The question before a court in any fee-fixing case, fee-shifting case, is what is the appropriate market rate to use. The evidence that the court considers to be relevant with respect to that particular market's compensation rate might include how much attorneys generally charge for the provision of services. The precise question would be how does the market compensate attorneys providing similar services and having similar skills.

QUESTION: Well, if there's no objection to the trial court taking into account the discrete market which consists of those who undertake representation in cases of this type, and if that discrete market includes an enhanced hourly rate for the contingency factor then it seems to me it makes no difference what we rule in this case. We might as well rule against you and have it all out in the open.

MR. CLAPP: I think there is a basic distinction that the lodestar method adopted by this Court contemplates. That is in effect there is no market that

measures risk of loss contingency compensation for these types of cases because the market is in fact determined by the courts and not by market forces. There is no relevant market to look to to attempt to measure any difference in compensation for risk of loss in these particular types of cases as opposed to the market in general.

QUESTION: Mr. Clapp --

MR. CLAPP: Yes.

QUESTION: Could I test that with you just a moment? I know when I was in practicing sometimes you take a case and you get, say, paid, say, maybe then it was $25 or $30 an hour, win, lose, or draw. But if you were going to take the case and you make a deal with the client that if I win it you'll pay me $40 an hour, instead of $30 or $25. Now which -- and that's, say all lawyers, a lot of lawyers made those same alternative offers to their prospective clients, $40 if I win, I get paid, I get nothing if I lose, $25, win, lose, or draw. Which is the right lodestar fee in that market, say that's the evidence?

MR. CLAPP: If that's the evidence, Your Honor, the evidence with respect to the $40 fee is irrelevant to this particular market. Let me explain very briefly why. That $40 fee is negotiated between the lawyer and his client. That $40 fee typically in a tort contingency

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case --

QUESTION: It's a contract case.

MR. CLAPP: -- reflects cross-subsidation of other efforts by that attorney representing similar plaintiffs. And the point finally, Mr. Justice Stevens, is that you simply could not, no court could determine how that particular market compensated for risk. That $40 that you're quoting represents that particular attorney's hope with respect to a fee recovery.

QUESTION: No, it's the bargain -- the client had the choice. He could either make the $40 commitment or the $25, win, lose, or draw. And you say the $25 fee would be the one that would be the market-determined?

MR. CLAPP: That's correct.

QUESTION: But the other one is also. Everybody in the market has the other alternative too.

MR. CLAPP: But it's a different market from fee-shifting statutes for the reasons that I have indicated.

QUESTION: Oh, I see, we have a special market when there's a fee-shifting statute?

MR. CLAPP: No, we have the market -- whether we're talking about a market for legal services or a market for automobiles, Your Honor, reflects different subclasses, and fees that are negotiated --

QUESTION: That's right. You pay a little more if you get a warranty and a guarantee than you do if you don't when you buy a car.

MR. CLAPP: Well, but fees that are determined with respect, or by negotiation between a party and his attorney --

QUESTION: Against the background of what alternatives are available in the market.

MR. CLAPP: But that -- understand, Your Honor, that in these sorts of cases, in fee-shifting cases, the client is going to have no interest in limiting his attorney's compensation where the case is on a contingency basis, because he's not going to pay it anyway. It's going to be someone else who will pay that fee. He might as well agree to a rate of, in your example, $200 an hour.

QUESTION: No, but I'm assuming he would, you try to make him -- you would make the statutory fee be one that would be a duplicate of what would have been negotiated in a free market. That's what I was suggesting.

MR. CLAPP: And my response to that is, Your Honor, if the free market doesn't reflect that hourly rate to the extent the courts intervene --

QUESTION: Well, how did the $40 figure get there if it wasn't determined by market forces? I mean,

do you think just the lawyer just cooked it up out of thin air? In my hypothetical, don't you have to start from the assumption that he thought that the market would justify these two alternative ways of computing a fee?

MR. CLAPP: Well, the market might justify that --

QUESTION: Well, it did when I was in practice.

MR. CLAPP: -- Your Honor, but it would not be the result of free market operation. It would be the result of negotiations between that party and his client.

QUESTION: But your argument assumes that if the client had hung tough and said no, $25 is as high as I'm going to go, he would have taken the case anyway on a contingent fee. If the client had said, you know, $25 only if you win, that he would have taken the case anyway. And that's -- I mean, I don't think we can make that assumption, can we, if we are fact-finders?

MR. CLAPP: It's not necessary to make that assumption.

QUESTION: Maybe what you're saying is go ahead and make that assumption and see what happens, and if it turns out that nobody takes these cases, then maybe you'd better modify your assumption. But if you can, if you the court can hang tough as a fact-finder and still get the lawyers, that's what you ought to do.

MR. CLAPP: Well, and my response to that should be, Your Honor, is that if in fact the market rates are insufficient to attract counsel, then Congress should make decisions about what steps it wants to take to enforce its policy. It shouldn't be the courts --

QUESTION: Well, isn't the problem with that response that Congress, I thought, gave the courts the responsibility for determining a rate that would in fact attract?

MR. CLAPP: Congress authorized the court to award a reasonable fee. It did not, it seems to me nothing in the statutes or the legislative history authorizes the courts to legislate, make legislative decisions about what that reasonable fee ought to be.

QUESTION: No, but I thought you were telling me that if we took the hang tough position as fact-finders and said look, we're going to latch onto the $25 figure and if it works, fine, that's the figure we'll use for the future, maybe adjusted for inflation. If it doesn't work we'll go back to the drawing board and say maybe we'd better go up to 40. And I thought your response was no, no, it's up to Congress whether to decide to go up to 40.

MR. CLAPP: That's precisely my point.

QUESTION: Well, I think you're saying, then, that it is not our's, it is not the court's responsibility

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to determine as a matter of fact what is necessary to attract counsel to take these cases. You're saying if the court comes up with a figure that doesn't attract them, too bad, the court's job is done. Look to Congress. Isn't that what you're saying?

MR. CLAPP: In essence that's what I'm saying, Your Honor. Any other solution necessarily gets the court involved in those sorts of policy decisions. To what extent should our system encourage the bringing of these sorts of cases? Those are policy decisions that Congress should make and that this Court is frankly not equipped to make.

Thank you very much.

QUESTION: Thank you, Mr. Clapp.

Mr. Seamon, we'll hear from you.

ORAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING PETITIONER

MR. SEAMON: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin by addressing the question that has arisen already as to what hourly rate a court does look at and should look at in calculating the lodestar. I would note that at page 14 of the ABA's brief they mention that the only ascertainable prevailing market

rate is the rate charged to clients who pay regardless of the outcome. So as a practical matter it is difficult if not impossible to find lawyers in the market who tell their clients I will charge you $25 an hour if you're willing to pay regardless of whether we win or lose, but if you want me to take this on a contingency basis then I'm going to charge you $40 an hour.

QUESTION: What about the situation which certainly was more common at the time when I practiced, I'll either take it so much an hour if you're good for the fee, win or lose, or else I'll take one-third or one-half, you know, not always one-half, of the recovery if we win? How does that fit into the picture?

(Laughter.)

MR. SEAMON: I think that that is still the prevailing practice, that when a lawyer takes a contingency, makes a contingency arrangement he contracts with the client for some percentage of the ultimate recovery.

Now, Justice Stevens raised the question well, what if you can get an economist to come in and say I have looked at all of these contingency arrangements and I have decided that in fact they end up amounting to $40 an hour of compensation for the lawyers rather than 25. We would say that it may be fair in that case for a lawyer to

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charge $40 to his client, but the fairness in that instance resides on the fact that it is the product of the consensual arrangement between the plaintiff and his client.

In the fee-shifting context the situation is very different. There isn't this consensual relationship at all that determines the payment. In fact the defendant in the case is required to pay the plaintiff not based on the defendant's conduct that led to the suit in the first place, and for that matter not based on the defendant's conduct during the trial, but based --

QUESTION: Well then when you say a fee is fair in the sense of the $40 fee, you mean it's fair by virtue of the fact it was consented to, and not by virtue of the fact that it represented market?

MR. SEAMON: That's correct. Or to put it another way, the fact that it is consensually agreed to is what makes it the market, you know, what the market calls for and what the market will provide. The fee-shifting context by definition is very different. The very existence of the fee-shifting provisions means that the normal market is not going to operate in fee-shifting litigation --

QUESTION: Well, doesn't that simply mean that you've got to look for your examples outside the sphere of

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these kinds of cases?

MR. SEAMON: That's correct, you do have to look outside --

QUESTION: But it doesn't mean that the $40 is not the market figure, assuming that that was not a case of this sort, assuming we're outside this sphere of cases. The $40 is still the market figure, isn't it?

MR. SEAMON: Yes, it may be possible to establish a market figure that prevails in the private, unregulated market, but to apply that in the context of fee-shifting is to say that the defendant should pay not on the basis of what he did that led to the lawsuit but on the basis of what arrangement the plaintiff has made with his client.

QUESTION: Do you think you can establish such a contingent fee in the private market for a category of cases?

MR. SEAMON: No.

QUESTION: I mean, isn't it the nature of a contingent fee that it depends enormously upon how good the case looks to the lawyer?

MR. SEAMON: That's right. I was assuming in my earlier answers that you can come up with a fee of $40 per hour that are charged by contingency lawyers.

QUESTION: For a whole category, but I don't --

that doesn't strike me as likely.

MR. SEAMON: No, I think that normally the percentage of recovery is going to in large part reflect the amount at stake as well as the merits of the particular case. And --

QUESTION: And the latter would be quite, quite counter-productive as far as the policies of this statute are concerned. That is the riskier the case, the higher the fee you should get. Whereas the statute wants to reward lawyers for taking worthy cases. And what you're saying is the less worthy the case, the higher the fee.

MR. SEAMON: That's correct. And that reasoning also punishes defendants who have the most meritorious defenses. The defendants who are most difficult to prevail against should in theory, under the theory that our opponents espouse, be charged the highest bonuses because they are --

QUESTION: Are you saying the difficulty of the case is irrelevant in computing this magnificent certitude that we call the lodestar?

MR. SEAMON: In practice it has turned out to be largely irrelevant because the hourly --

QUESTION: Well, should trial judges be instructed that they may not take into account the difficulty of the case in setting the fee?

MR. SEAMON: Not as a separate matter, Justice Kennedy, because the difficulty of the case is going to be reflected both in the hourly rate that a lawyer of the adequate experience is able to charge as well as the number of hours expended in litigating the case. Presumably the more difficult the case, the harder it will be to litigate, the more hours expended, and the higher the lodestar.

QUESTION: What about the probable merits of the case, the probability of success?

MR. SEAMON: No, we think that the probability of success is irrelevant in calculating the lodestar and also should be irrelevant as a separate matter --

QUESTION: I take it most of the circuits are in disagreement with that proposition and most of the circuits do include probability or likelihood of success in assessing the lodestar amount? Or am I wrong about that?

MR. SEAMON: Basically right. Most of the circuits have attempted to follow this Court's decision in Delaware Valley II by taking the approach proposed in the concurring decision there and look to whether the plaintiff had actual difficulty in getting counsel, and secondly how, if at all, the market compensates for contingency.

I just want to emphasize the first point that, even assuming we get beyond these evidentiary difficulties and decide that in fact the contingency market charges $40 an hour, it is still very different from saying that that's fair to charge a client, to go from that conclusion to the conclusion that this is fair to make a defendant pay. Again, this charge is not based on the defendant's conduct, but is based on whatever arrangement the plaintiff has made with his attorney, and we don't think that Congress intended the term reasonable attorney's fee to mean different things depending simply on what arrangement the plaintiff has made with his attorney.

And in fact this Court rejected a similar view of congressional intent in Blanchard v. Bergeron where it held that the amount of the fee cannot be determined by whatever contract the plaintiff has made with his attorney. The same principle operates here.

QUESTION: The problem with that is in cases where there are no damages being sought or awarded.

MR. SEAMON: I'm sorry, I don't --

QUESTION: Well, where only an injunction is sought, why, what deal the lawyer and his client make seems to me to be irrelevant.

MR. SEAMON: It absolutely is irrelevant in our view as well. Nonetheless many of the lower courts,

including the court in this case, has held that this arrangement, this contingency arrangement that was in fact made is a basis for enhancing the lodestar fee by 25 percent.

Beyond the evidentiary problems, and we think the unfairness problem that this confronts or assumes that Congress intended, there are a number of fundamental conceptual difficulties with the market theory that is driving our opponent's position. In our view one essential flaw is that it assumes that litigation under fee-shifting statutes should operate in the same way as litigation does in the private market. But in fact the very existence of the fee-shifting provision radically alters the way the litigation will proceed, as this Court recognized in Evans v. Jeff D.

In a fee-shifting case there is this prospect of a lodestar or some sort of award sitting at the end of the litigation that will influence the way a defendant considers litigating the case and influence the defendant's judgments about making a settlement or not. That same dynamic doesn't operate in the typical contingency case where the plaintiff in a personal injury suit, for example, pays the same amount as a judgment whether the plaintiff has a contingency arrangement with his attorney or not, and if there is a contingency

arrangement whether the attorney is going to get 25 percent or 40 percent. The only point here is that the dynamics are different, and so there's no reason to assume that the litigation should operate the way the market operates.

QUESTION: Thank you, Mr. Seamon.

MR. SEAMON: Thank you.

QUESTION: Mr. Goldstein, we'll hear from you.

ORAL ARGUMENT OF BARRY L. GOLDSTEIN

ON BEHALF OF THE RESPONDENTS

MR. GOLDSTEIN: Thank you, Mr. Chief Justice Rehnquist, and may it please the Court:

What did Congress mean by the term reasonable attorney's fees? There is no dispute on this record or by the parties that contingent risk of non-payment is taken into account on occasion in the legal marketplace. In fact the City asserts in its brief that the lodestar calculation already reflects consideration of contingency, apparently because contingency is taken into account in the legal marketplace. In its reply brief, the City reiterates that point. If the market compensates for risk of loss contingency, determination of the market rate subsumes and incorporates that factor.

We're not here today to argue whether or not contingency should be taken into account in that mythical

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term, or that real term now that it has been adopted by the Court, lodestar, or after a lodestar is determined by an enhancement or adjustment. The only issue before this Court is whether the risk of non-payment because of the contingent nature of a case should be taken into account. There is no question that that is taken into account in the legal marketplace.

Congress has legislated --

QUESTION: Mr. Goldstein, you say there's no question it's taken into account in the legal marketplace, but what evidence is there before us that it's taken into account in a differential and hourly rate as opposed to a percentage of recovery?

MR. GOLDSTEIN: Well, that's a good question, is how --

QUESTION: I'm glad you think so.

(Laughter.)

MR. GOLDSTEIN: In this particular case there is evidence in the record that attorneys in the Burlington, Vermont market expect a higher return for their hourly time when they take a case on a contingent basis.

QUESTION: Lawyers quote a higher, or simply their experience is that they take, that their percentage recovery gives them a higher hourly rate?

MR. GOLDSTEIN: That's one way that it can be

shown, as to what expected hourly rate will be satisfactory for a lawyer to invest, as Mr. Pearson did, 7 years of time and 3,000 hours with only a chance of getting paid. What anticipated hourly rate? There are also other types of evidence available on that. Justice Stevens pointed to his experience in private practice, and we have lodged with the Court a series of declarations that have been used in fee-shifting statutes, and there's a declaration of a Mr. Camen who is a partner at Jenner and Block in Chicago in which he attaches the agreement that Jenner and Block entered into with MCI in the big antitrust lawsuit against AT&T, in which MCI agreed to take half of their normal hourly rate, a partial contingency --

QUESTION: Jenner and Block agreed to take.

MR. GOLDSTEIN: Yes, excuse me. I'm sorry. Thank you.

QUESTION: And then what was the other?

MR. GOLDSTEIN: And if they succeeded then they would get paid 2.5 times their hourly rate, and that's set forth in the agreement. Another way of proving -- excuse me.

QUESTION: That is all by contractual agreement. I mean, I suppose that in a particular case a lawyer on a non-contingent basis can cut a deal with a client. Even

though the market is $60, he may agreed with the client for $80. But that's by special contractual agreement. Now, we wouldn't allow the $80 fee to be recovered simply because they bargained for it, so why should we allow the higher contingent fee to be recovered just because they bargained for it?

MR. GOLDSTEIN: Justice Scalia, the one contract, the contract that Mr. Camen attaches to his declaration, would not determine the market, but it would be evidence of the market. The market would be determined by all of the contracts, all of the evidence that was put before a court by both sides in order to present what the market would pay a lawyer for a comparable case. That is what Congress, we submit, intended by adopting the term reasonable attorney's fees. Congress has used this term for over, for approximately 80 years, in a whole series of statutes, statutes enacted way before the Environmental statutes at issue in this case.

QUESTION: Mr. Goldstein, could I ask you, am I right in reading the court below as not thinking that Delaware Valley II was, should be used as any guide to resolving the fee issue, and then instead it just relied on one of its prior, one of its prior authorities and certainly didn't go through the approach that Justice O'Connor suggested?

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QUESTION: Yes, that's correct, Justice White. It relied on Friends of the Earth, a Second Circuit authority which in fact adopted part of the, prior to Justice O'Connor's opinion, adopted part of that opinion or set out what became that opinion.

QUESTION: Was there any proof in this case as to what it would take to get a lawyer for this plaintiff?

MR. GOLDSTEIN: Yes. The only proof in this case is that there would need to be an enhanced hourly rate, that is an enhancement over what is paid, win or lose, in order to get a lawyer in the Burlington market.

QUESTION: You mean they just referred to the market and decided what it would take to get a lawyer in this case, rather than having any kind of actual proof that this plaintiff tried to get a lawyer and couldn't find one, or what?

MR. GOLDSTEIN: Well, like the standard adopted by Justice O'Connor, the proof depended upon what was generally expected in the Burlington, Vermont market, and Mr. Pearson and the Dagues put in the affidavits of three practitioners in the Burlington market in addition to three affidavits by members of the firm saying that there was no incentive to take a case without an --

QUESTION: The court below didn't determine its fee based on either the, either of the opinions in

Delaware II. They didn't use the standard of either the opinion that I wrote or the opinion that Justice O'Connor wrote.

MR. GOLDSTEIN: No, that's correct, Your Honor. But the issue before this Court, the question presented is whether district courts have under any circumstances the discretion to consider the risk of non-payment in determining what is a reasonable fee, not the method. The lower courts both said that, but for the opportunity for enhancement to an hourly rate, there would be substantial difficulties for a plaintiff to obtain counsel in the Vermont marketplace.

Prior to the passage of these statutes it was common under the reasonable fee provision in the antitrust statutes, in the securities statutes, for lower courts to take into account contingent risk of non-payment in determining a reasonable fee. It was against this backdrop that Congress legislated in the environmental area and adopted the reasonable fee statute in the 1970's.

In interpreting these statutes prior to the passage of the environmental statutes in the seventies, clearly risk of non-payment was taken into account. Congress has to be credited with knowing how a statutory term that they used in the 1970's has been interpreted from 1914 when the Clayton Act was passed until the

1970's. This is especially true where, as pointed out by the American Bar Association in a forceful way in its amicus brief, that the fact that contingent risk is taken into account in the American legal marketplace is notorious. Everyone knows it. Now, how it's taken into account in a specific case may vary.

All that we are saying is that the court should not turn a blind eye to the reality of the legal marketplace and permit, where appropriate, local courts to consider the risk of contingent non-payment. Moreover --

QUESTION: What claim of enhancement was presented to the Court?

MR. GOLDSTEIN: A 2.0 claim, that is a doubling. The court ruled that a 1.25, that is a 25 percent enhancement was appropriate and would prevent --

QUESTION: Were you claiming that it was -- a 50 percent enhancement really reflected what the market in Burlington was?

MR. GOLDSTEIN: A doubling. Yes.

QUESTION: And the court said sorry, that isn't what the market requires in Burlington?

MR. GOLDSTEIN: That's correct.

QUESTION: How did he, how does a court go around figuring out how to disagree with these experts in the market?

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MR. GOLDSTEIN: The court, as courts do, sometimes reject experts, sometimes reject testimony and sometimes accept it in part. And of course --

QUESTION: Does it involve, doesn't it involve a court deciding what the degree of risk is? If you're going to enhance for risk, I suppose you'd give a different enhancement for a small risk and a bigger one for a larger risk.

MR. GOLDSTEIN: Well, this court --

QUESTION: Is that right?

MR. GOLDSTEIN: I'm not sure if the question goes to what this judge did or if it's a general question that you're asking me, Justice White.

QUESTION: I'll take it both ways.

MR. GOLDSTEIN: Okay. What this court did was not look at the risk of this particular -- excuse me. This court did look at the risk of this particular case and say that it was a risk --

QUESTION: And do you think that's proper?

MR. GOLDSTEIN: No.

QUESTION: I didn't think you did, because you put in, you asked for 50 percent, which you thought reflected the market.

MR. GOLDSTEIN: No. I don't think --

QUESTION: You must have thought it reflected

the market.

MR. GOLDSTEIN: Excuse me. We think that the approach suggested by Justice O'Connor in Delaware Valley II is the appropriate way of determining whether an enhancement should be awarded, and if so, the degree of the enhancement. And that is to look at the risk in a comparable class of cases, which in this particular situation would be complex contingent civil litigation in the Vermont marketplace.

QUESTION: 50 percent. I mean, a 50 percent enhancement.

MR. GOLDSTEIN: Whatever the evidence would show.

QUESTION: Well, you thought it showed 1.5.

MR. GOLDSTEIN: 2.0, actually.

QUESTION: I mean 2.0.

MR. GOLDSTEIN: Yes. But the analysis that was done in this case, and again the issue of how it should be done is not before the Court --

QUESTION: Well, if you thought it ought to be done according to Justice O'Connor's opinion, which would have come out with 2.0, you should have cross-petitioned for not enough money.

MR. GOLDSTEIN: Well, I think there's a time -- well, perhaps we should have, but we did not. And the

only issue that's before this Court is whether enhancement for contingent risk can be taken into account under any conditions by the local courts like this judge did.

Let me just add one other thing to answering your question, Justice White, and that is unlike some of the technical issues that were before the court in this case, that is the extent of the toxic waste in this particular dump and how it was impacting on the Burlington marketplace, which I don't think the local judge, I may be wrong, had any particular knowledge about, determining the legal marketplace and appropriate and reasonable attorney's fees is something that, as this Court has said on a number of occasions, that courts have familiarity with.

Justice Stevens referred back to his experience in private practice. Judge Billings has a lot of experience as a state court judge, as a Federal court judge, as a practitioner in the local marketplace in Burlington. There should not be a national rule. The situation may be quite different in Burlington, Vermont and where I practice in Oakland, California.

Moreover, Congress well knows how to limit the award of attorney's fees. It has done that on many occasions. In these statutes Congress put a standard, reasonable attorney's fees. Congress placed no limits on

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this standard as Congress has done in many other statutes. To name just a couple, in the Individuals with Disabilities in Education Act Congress said no bonus or multiplier may be used in the calculation of the reasonable attorney's fees. There was no such restriction in this case. In the Equal Access to Justice Act Congress said reasonable attorney's fees, prevailing market rates, but not more than $75 an hour. There is a host, as this Court well knows, of other statutes with limitations on fees.

QUESTION: Some of those limitations that Congress put in later statutes were in response to the emerging fee jurisprudence of this Court, were they not?

MR. GOLDSTEIN: Well, I think yes, Mr. Chief Justice Rehnquist, but I think it goes to prove our point rather than undercut it. Because for example, let's take the Individuals with Disabilities in Education Act which was passed in 1986. In that statute there was a limitation put on bonuses and multipliers. At almost the exact same time as this act was passed Congress also passed the Superfund law amending, CERCLA, to put in a citizens' suit provision. In that law, passed at the same time when the limitation was put in the IDEA statute, Congress put in the Superfund law the exact same reasonable attorney's fees statute as exists in the two

statutes before this Court, the Clean Water Act and RCRA.

And I think when you take all of these statutes together you come to a conclusion that Congress, under these statutes where it did not put limitations on reasonable attorney's fees, meant for the market to govern, and that contingent risk may be taken into account under appropriate circumstances.

Justice Scalia's statement in Casey I think is right to the point, where the Court said a comparison of statutes is proper because statutes are construed to contain that permissible meaning which fits most logically and comfortably with the body of both previously and subsequently enacted law.

QUESTION: It's harder to do that when the later law is a specific response to a judicial decision that has come in the interim, because if -- if you know what I mean. I may be an indication that that Congress thought that the judicial decision was wrong, in which case they would have meant without that qualification what they meant in the earlier statute. Are you following me?

MR. GOLDSTEIN: I am, but -- perhaps I am --

QUESTION: And that was not the case in Casey. There you had qualifications upon the term that had been adopted down through the years and not in response to any particular line of jurisprudence.

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MR. GOLDSTEIN: I'm not trying to say that's a direct relationship with Casey, it's just the principle. But I think my answer to Chief Justice Rehnquist's question still applies, and that is Congress certainly looked with open eyes to the possibility of contingency fee enhancements after a certain point and decided to include such enhancements in some statutes and not in others. In a statute very much like the ones before this Court, Congress decided not to place a restriction.

And let me just add one other part to it. There were restrictions on fees that Congress put in prior to 1972 and prior to when anybody, as far as I know, heard of the term lodestar.

QUESTION: But not particularly on contingencies. I mean, that's the only kind of restriction that I think really, really speaks clearly to what we're talking about here.

MR. GOLDSTEIN: Well, in the American-Mexican Chamizal Convention Act of 1964 reasonable attorney's fees shall not exceed 10 percent of the amount awarded, and similar restrictions --

QUESTION: No, but, but you have some later statute that specifically says shall not include any amount for contingency.

MR. GOLDSTEIN: Well, for bonus or multipliers.

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QUESTION: Bonus or multipliers.

MR. GOLDSTEIN: You know, I really think that --

QUESTION: That's impressive. I don't think the mere fact, however, that some other statutes limit the upper amount or said not in excess of 10 percent, I don't think that necessarily speaks to whether Congress thought that a contingent fee would be allowed.

MR. GOLDSTEIN: Justice Scalia, I hate to argue with you if you say an argument you heard was impressive --

QUESTION: No, I want you to. I mean, I'm not raising it with you for, you know --

MR. GOLDSTEIN: But let me just say that I think that, you know, the terms changed. And, you know, bonus, multipliers, lodestar, I don't think Congress would have thought in those terms in the 1940's and the 1950's or the early 1960's. What they thought about when they wanted to limit contingency enhancements was limit the percentage, and that's exactly what Congress did.

QUESTION: But they were still saying a reasonable fee but no allowance for contingencies.

MR. GOLDSTEIN: Reasonable attorney's fees which shall not exceed 10 percent of the amount awarded.

QUESTION: Or will not reflect any risk.

MR. GOLDSTEIN: Above the amount of risk

reflected by the 10 percent.

QUESTION: But even with that limitation it still would have been a reasonable attorney's fee.

MR. GOLDSTEIN: Well, there was a limitation on what could be a reasonable attorney's fee.

QUESTION: Well, it was still reasonable.

MR. GOLDSTEIN: By the definition under that act.

QUESTION: Yes, under that act. And of course what Congress meant by reasonable in one act, especially a later one, shouldn't be a measure of what they intended reasonable to be on an earlier act, I suppose you would argue, correctly.

MR. GOLDSTEIN: I think Congress determined that a reasonable attorney's fees under a particular act which could be reasonable with limits, but with other acts, such as the ones before this Court, a reasonable attorney's fees would be one that would be motored by the economic forces in the legal marketplace without limit, other than the limit of the discipline of the marketplace.

I don't think this question is a lot different in theory or practice than many other questions that this Court has wrestled with with respect to the interpretation of the term reasonable attorney's fees. In wrestling with these other terms this Court has looked to the

marketplace. For example, in Blum v. Stenson the Court considered what should be the hourly rate factor that's involved in the lodestar. The Court said that the hourly rate would be calculated by prevailing market rates for similar services by lawyers of reasonably comparable skill, experience, and reputation. Again, go to the market.

In Missouri v. Jenkins the issue of delay came up. Should delay be compensated for. That is Mr. Pearson has put in more than 3,000 hours in this case to close the toxic dump in Burlington. He has not gotten paid a penny. He advanced $16,000 out of his own pocket. He hasn't gotten reimbursed yet. Should the delay in payment be compensated for. In Missouri v. Jenkins the Court said that since the market treats compensation paid years after it was rendered differently from compensation paid when the services were rendered, courts may consider delay in determining a reasonable fee.

Without going into it, the Court also looked to the marketplace to determine what is appropriate compensation for paralegals and law clerks, which is -- and relied on the market. Compensation for paralegals and law clerks is nowhere near as embedded in the marketplace for legal services in this country as is payment for contingent risk.

All we are saying is that as this Court has directed local courts to look at the marketplace to resolve these other questions which can be difficult, the Court should also direct lower courts to look at the marketplace to determine payment for the contingent risk of non-payment.

The last part of my argument is that Justice O'Connor's test, which borrows in significant part from Justice White's opinion in Delaware Valley, is workable. Not only is it workable, but it has worked. The Court now has the experience of several years of implementation of the Delaware Valley test. Nine circuits have applied it. We go through the way the circuits have applied it in our brief, and courts have applied it. They have awarded contingent risk in some cases --

QUESTION: So what should we do? This isn't the standard the lower court used. They rejected the standard and moved to, and decided it on another standard. Should we just -- if we agree with you shouldn't we remand for recomputation of the attorney's fees?

MR. GOLDSTEIN: I have two answers to that. First, it is not -- the issue of whether or not the enhancement was correctly calculated in this case is not before the Court in the question presented. The only question is whether or not the court had discretion. If

the Court limits its opinion in this case to the question presented, then it should affirm. If the Court sets a standard and as we suggest adopt Justice O'Connor's standard and feels that it should apply to this case even though it's outside the question presented, then of course it should remand the case.

Justice O'Connor's test we believe provides the answer to a lot of the legitimate concerns raised by Justice White in the opinion in Delaware Valley. If, as Justice O'Connor suggest, contingent enhancement is based upon a comparable class of cases, then the discipline of the market serves the purpose of the statute. It serves to weed out the less worthy cases. An attorney, as we suggest --

QUESTION: There's no market for contingent fees in non-monetary cases. I mean, there are for Sherman Act cases, but for cases seeking injunction against Federal action, what's the contingent fee market here? You're going to have to make it up.

MR. GOLDSTEIN: Well, the Congress addressed that problem, and that's one of the reasons there are attorney fee statutes in a case like this in which there, it principally is focused on an injunction to close the toxic landfill or a civil rights case where it's to integrate a plant. And Congress said that the court

should look to cases in, comparable cases, and in particular, and I'm now referring to the legislative history of the 1976 Civil Rights Act which courts have looked to, cases that present a comparable difficulty, such as antitrust cases, and particularly said that civil rights plaintiffs should not be put in a different and less beneficial place --

QUESTION: Congress said all this where?

MR. GOLDSTEIN: In the Senate report --

QUESTION: Not in the statute.

MR. GOLDSTEIN: Congress -- yes. Congress relied on the term reasonable attorney's fees.

QUESTION: And the committees used this language you're referring to?

MR. GOLDSTEIN: That's correct, Mr. Chief Justice. And the term reasonable attorney's fees has, as I have discussed, been used to focus the courts upon the relevant market as best as the courts can find it.

In conclusion, local courts have discretion to consider the risk of non-payment as a part of reasonable attorney's fees. The courts should have that discretion, just as local courts consider other aspects of the award of reasonable attorney's fees. In the legal marketplace fixed fees are treated differently, generally treated differently than contingent fees. The two should not be

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considered the same in the determination of a reasonable attorney's fees.

QUESTION: I would think if it's, I would think the way to go about this compensation for risk would be to pay the lawyer when he loses. He has taken -- you know, you want these people to have lawyers, and if a lawyer is willing to take this case, he, some lawyers are bound to lose, you ought to pay them for that rather than have the defendant when he wins have to pay for the cases when you lose.

MR. GOLDSTEIN: Justice White, I would disagree with you on that, but the important point is that Congress has decided that question and determined that only prevailing parties obtain fees. And the result of that, coupled with Justice O'Connor's test, is that the marketplace forces attorneys to weed out the less worthy cases and to select the strongest cases.

Lastly, under different statutes and for many years courts have considered risk of non-payment in determining reasonable attorney's fees. The Court should affirm this long-standing practice and adopt the practical and workable approach suggested by Justice O'Connor.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldstein. The case is submitted.

(Whereupon, at 3:00 p.m., the case in the above-entitled matter was submitted.)

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