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Fee-Shifting Statutes and Compensation for Risk

MAUREEN CARROLL*

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. This Article argues that this prohibition should be eliminated, and to that end, it evaluates specific methods of including compensation for risk in federal fee-shifting awards.

* Assistant Professor of Law, University of Michigan Law School. For helpful comments and conversations, I am grateful to Nick Bagley, Lynn Baker, Bob Bone, Emily Carroll, Sherman Clark, Ed Cooper, Ed Fox, Rich Friedman, Bert Kritzer, Liz McCuskey, Linda Mullenix, Mark Osbeck, Nicole Porter, Paul Reingold, Gil Seinfeld, Margo Schlanger, Charlie Silver, and Adam Zimmerman. I would also like to thank participants in the Civil Procedure Workshop, the Law & Society Association annual meeting, the University of Toledo College of Law faculty workshop, and the Colloquium on Current Issues in Complex Litigation at the University of Texas School of Law. Finally, I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan Law School.

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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 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

1. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790–91 (2011); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (“Every significant contemporary civil rights statute contains some provision for attorney’s fees”); Kathryn A. Sabbeth, *What’s Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465 (2014). State legislatures have enacted a number of fee-shifting statutes as well. See *infra* Section III.A.

2. Some statutory and contractual provisions authorize fee shifting for the benefit of the

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 an attorney's reasonable hourly rate by the number of hours reasonably expended on the litigation, yielding 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., noncontingent) 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

To understand the impact of this prohibition, consider *District of Columbia v. Heller*,⁸ in which 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 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, though it was ultimately

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. Under these statutes, a defendant generally cannot receive fees unless the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 421 (1978).

3. *E.g., Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees . . . 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 (2000).

5. This Article focuses on the compensation a law firm (including a solo practice or public interest law organization) should receive for representing a particular client. It does not address the distinct question of how much compensation an attorney should receive from her employer or practice. Although an attorney's salary or income can be affected by the compensation her law firm receives for a particular case, it can also depend on a host of other 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, 567 (1992).

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

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

9. *Id.* at 635.

10. *See id.* at 625–26 (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, 178–79 (1939).

12. *See Adam Liptak, Carefully Plotted Course Propels Gun Case to Top*, N.Y. TIMES

successful, *Heller* was initially 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. Consider a plaintiff who was fired the day after she reported the defendant employer to the Department of Labor for failure to pay overtime wages.¹⁵ Notwithstanding the eyebrow-raising timing, the defendant might contend it fired her because of her job performance, rather than out of retaliation. Her former supervisor (especially if still employed by the defendant) might support that story. These circumstances could create a genuine dispute of material fact, necessitating a trial;¹⁶ and because credibility determinations belong to the finder of fact, the outcome of that trial could not be known in advance.¹⁷ Accordingly, regardless of the ultimate outcome, the claim would initially involve some amount of risk.

(Dec. 3, 2007), <https://www.nytimes.com/2007/12/03/us/03bar.html> [<https://perma.cc/2TQX-EY9Q>].

13. See *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 37 (D.D.C. 2011) (awarding fees based on a reasonable number of hours multiplied by a reasonable noncontingent hourly rate). The plaintiff's 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, at 26 n.10, *Heller v. District of Columbia*, 478 F.3d 370 (D.D.C. 2007) (No. 1:03-cv-00213-EGS), <http://www.scotusblog.com/wp-content/uploads/2008/08/heller-fee-memo-8-25-08.pdf> [<https://perma.cc/2XB7-SBS4>].

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. LAW. (Jan. 22, 2010), <https://sdgln.com/news/2010/01/22/challenging-prop-8-hidden-story> [<https://perma.cc/W8U2-DR7K>].

15. Wage theft and retaliation are pervasive in the low-wage workforce. See Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1309–10 (2019); see also Andrew Friedman & Deborah Axt, *In Defense of Dignity*, 45 HARV. C.R.-C.L. L. REV. 577, 577–78 (2010).

16. See FED. R. CIV. P. 56(a) (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 notwithstanding the verdict only if no reasonable jury could have reached the verdict it did on the basis of the evidence presented).

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

As the Court recognized in *Dague* itself, “no claim has a 100% chance of success.”¹⁸ Accordingly, an attorney does not typically tell a client that she *will* prevail in her lawsuit; rather, the attorney advises her as to whether she is *likely* to prevail.¹⁹ 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,”²⁰ claimants currently face a structural impediment to securing representation in civil rights litigation and other fee-shifting cases.²¹ 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.”²² Because of *Dague*, however, many civil rights plaintiffs can offer nothing more.²³

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,²⁴

18. *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992). Moreover, 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. *See infra* Section I.A.

19. *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 (1971) (repealed 2018) (“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”) (emphasis added).

20. Charles Silver, *Regulation of Fee Awards in the Fifth Circuit*, 67 ADVOC. (TEX.) 36, 36 (2014).

21. *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, Sean Farhang & Herbert M. Kritzer, *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.”).

22. *Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) (quoting *Cherner v. Transitron Elec. 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.”).

23. *See infra* Section II.D. Although the Court has prohibited risk enhancements, it has authorized other upward adjustments to the lodestar, such as for delays in payment, *see Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989), and for extraordinary performance by counsel, *see Perdue v. Kenny A.*, 559 U.S. 542, 554 (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, 434–36 (1983).

24. 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

regardless of whether a fee-shifting statute applies.²⁵ 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,²⁶ for example, or to require a city to fix its infrastructure *before* the contaminated water poisons their children.²⁷

Congress should undo *Dague*, but if it does not, the Supreme Court can and should do so instead. On the one hand, stare decisis has special force with respect to decisions that, like *Dague*, involve statutory interpretation. Although the decision was wrong from the start,²⁸ mere incorrectness is not usually enough to overcome stare decisis.²⁹ On the other hand, changed circumstances reduce the force of stare decisis, and the Supreme Court has specifically recognized that changes in the legal market are an appropriate basis for modifying case law about fee-shifting statutes.³⁰ 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

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").

25. See *infra* Section II.A.1.

26. *Cf.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (involving a challenge to a statute that, if not enjoined, would have led to the closure of several medical facilities).

27. *Cf.* *Michigan Dep't of Envtl. Quality v. City of Flint*, 282 F. Supp. 3d 1002, 1016 (E.D. Mich. 2017), *reconsideration denied*, 296 F. Supp. 3d 845 (E.D. Mich.), 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).

28. The decision immediately drew criticism, especially with regard to its economic analysis. See, e.g., Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1115 (1993) (agreeing with the outcome but arguing that "Justice Scalia's economic analysis in *City of Burlington* is unsound"); 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"). *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 GEO. J. LEGAL ETHICS 621, 638–39 (1988) (criticizing the "inconsistent and unsophisticated Supreme Court uses of economic approaches" in earlier fee-shifting cases).

29. 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. 1660, 1985 (2019) (Thomas, J., concurring). That view, however, is an outlier.

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

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, this Article draws on the current state of knowledge about legal markets and compensation for risk. Consider 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."³¹ 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.³² As this work has shown, a law firm that enters into a contingent-fee arrangement provides the client with more than just its attorneys' labor.³³ 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.³⁴ The rates that law firms charge their contingent-fee clients include the monetary value of the risk-bearing services they provide.³⁵

In addition to contingent percentage fees, this Article examines state fee-shifting statutes,³⁶ common-fund awards to class counsel,³⁷ the "alternative fee arrangements" that for-profit law firms offer their clients,³⁸ and nonrecourse, case-

31. Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System: The Wisconsin Contingency Fee Study*, 81 JUDICATURE 22, 26 (1997).

32. See, e.g., HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004) [hereinafter REPUTATIONS AND REWARDS]; 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*]; Eric Helland, Daniel Klerman, Brendan Dowling & Alexander Kappner, *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971 (2017); 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*]; 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); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

33. 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.").

34. Kritzer, *Wages of Risk*, *supra* note 32, at 270.

35. See *infra* Section III.B.

36. See *infra* Section III.A.

37. See *infra* Section III.C.

38. See *infra* Section III.D.

specific loans made by third-party litigation funders.³⁹ Each of those contexts involves a mechanism for compensating risk-bearing services associated with litigation. This Article draws on the lessons of those contexts to evaluate options for incorporating compensation for risk into federal statutory fee-shifting awards.⁴⁰

The central implementation choice is between a uniform lodestar multiplier and one determined on a case-specific basis. Case-specific risk multipliers would bear more similarity to compensation for risk in other contexts, but they would raise concerns about administrability, because they would require a court to estimate the plaintiff's initial likelihood of success.⁴¹ A uniform risk multiplier would not require such an estimate, and thus would offer superior administrability, but would be more of a blunt instrument.⁴² Each option has its pros and cons, but both are reasonable, and either would significantly improve upon the status quo.

To be sure, the prohibition on compensation for risk is not the only obstacle to an effective fee-shifting regime. Because of the Supreme Court's interpretation of the "prevailing party" requirement, a defendant might entirely avoid fee eligibility even if the plaintiff receives all of the relief that she requested.⁴³ Fee-shifting awards under some statutes exclude expert witness fees,⁴⁴ 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,⁴⁵ even though no other relief is available for some constitutional violations.⁴⁶ The list could go on and on.⁴⁷ 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 clarifies which of them 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

39. See *infra* Section III.E.

40. See *infra* Part IV.

41. Case-specific multipliers could be implemented in such a way as to mitigate, though not eliminate, these types of concerns. See *infra* Section IV.B.

42. A uniform multiplier would nonetheless draw on the lessons of the contexts examined here, particularly with regard to the amount of time and effort needed to evaluate a plaintiff's likelihood of success. See *infra* Section IV.C.

43. See *infra* Section I.A.

44. See Davies, *supra* note 21, at 263–64 (discussing the extent and impact of prohibitions on the reimbursement of expert witness fees).

45. *Farrar v. Hobby*, 506 U.S. 103, 115–16 (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, 844–46 (2016) (discussing lower-court interpretations of *Farrar*).

46. See, e.g., *Carey v. Phipps*, 435 U.S. 247 (1978).

47. 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).

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.⁴⁸

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."⁴⁹

Contrary to the Court's assertion, some risks of nonpayment may be *inversely* proportional to the strength of the plaintiff's claim.⁵⁰ For example, a defendant facing a strong claim might offer to provide all of 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"⁵¹ (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.⁵²

48. 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.

49. *Pennsylvania v. Del. 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").

50. *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").

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

52. *See* *Evans v. Jeff D.*, 475 U.S. 717, 731–32 (1986); *see also* Reingold, *supra* note 24, at 18–21 (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* Section II.A.2 (discussing such fee arrangements). Otherwise, if the case is not a class action, a law firm might attempt to obtain

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,”⁵³ the court must usually dismiss the case as moot,⁵⁴ and the plaintiff will not qualify as a “prevailing party.”⁵⁵ In either of these scenarios, the court must usually deny any request for a statutory fee-shifting award.⁵⁶

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

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., D.C. BAR, ETHICS OPINION 289 (1999), <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion289.cfm> [<https://perma.cc/EAE7-465L>] (“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.” N.Y. BAR ASS’N, COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, FORMAL OPINION 1987-4 (1987), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1987-4> [<https://perma.cc/Y5HM-K8DP>].

53. 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).

54. 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) (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)). 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 (examining the barriers to applying this exception to government defendants).

55. *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 53, 1092, 1101–02 (describing the impact of *Buckhannon* on public interest litigation); Karlan, *supra* note 1, at 205–08 (criticizing the Supreme Court’s reasoning in *Buckhannon*).

56. 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. Cty. Council of Volusia Cty.*, 307 F.3d 1318, 1323 (11th Cir. 2002) (quoting 16 U.S.C. § 1540(g)(2)(A)(5)) (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.

demand because of risks specific to statutory fee shifting.⁵⁷ Even if you achieve an overwhelmingly successful result after years of hard-fought litigation,⁵⁸ 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 such an 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-eligibility standard.⁵⁹ 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.⁶⁰

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 hourly rates with this possibility in mind. Accordingly, even if a firm charges its clients through standard (i.e., noncontingent) hourly billing, one would expect its standard rates to reflect this particular risk.⁶¹ 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,⁶² 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

57. 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 48 and accompanying text.

58. 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).

59. For arguments in support of such changes, see Albiston & Nielsen, *supra* note 53; Reingold, *supra* note 24.

60. At the same time, the analysis will reflect the current prevailing-party standard, especially with regard to its effects on a defendant's ability to avoid fee liability.

61. *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”).

62. 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 61, at 116–18. In those circumstances, the firm's standard hourly rates might not reflect this particular risk of nonpayment.

resources it has invested in the litigation. It is this contingent risk on which this Article will focus.

Because the purpose of fee-shifting statutes is to enable plaintiffs with meritorious claims to find representation, this category of contingent risk is properly viewed from the standpoint of a law firm deciding whether to represent a claimant.⁶³ It turns largely on the information then available to the law firm about the merits of the claims—what the courts will likely say about the applicable law, what evidence will likely come out in discovery, how the fact finder will likely interpret that evidence, and so on.⁶⁴

“Risk,” however, is not synonymous with “merit.”⁶⁵ If a meritorious claim is one on which the plaintiff prevails, then any claim with a nonzero chance of success might turn out to be meritorious.⁶⁶ When a defendant settles for more than nuisance value, it implicitly acknowledges that the plaintiff had some nonzero chance of success,⁶⁷ and when a court calculates a fee-shifting award, it has already established that the plaintiff is a “prevailing party” who has obtained court-ordered relief.⁶⁸ In those contexts, to say that a claim initially appeared “risky” means only that the plaintiff initially faced obstacles to the success (whether through settlement or adjudication) that she ultimately achieved.

Indeed, although one scholar has argued that there is no apparent justification for subsidizing “risky” cases,⁶⁹ the world of litigation does not divide itself into “risky” and “risk-free” claims. The latter category does not exist, because all claims—even those that initially seem overwhelmingly likely to succeed—involve some amount

63. Cf. Osbeck, *supra* note 19, at 48 (“[O]utcome prediction is an important part of the initial case assessment that takes place before an action is originated.”).

64. 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.

65. This recognition of the difference between “risk” and “merit” is itself distinct from the recognition that “meritless” does not mean “valueless.” See Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1197 (2014) (examining “the many ways in which nonmeritorious, but nonfrivolous cases can contribute to the law”).

66. *Id.* (“If we cannot determine at filing that a case has a zero chance of success, then the case may be meritless or meritorious . . .”).

67. Cf. 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”).

68. See *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001); see also *supra* Section I.A.

69. See Hylton, *supra* note 28, 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”).

of risk.⁷⁰ Because of this ubiquitous uncertainty, a “risky” case is just a case, not necessarily a long shot.⁷¹

Finally, although one might assume that successful but initially higher risk cases will generate a higher lodestar value,⁷² the structure of our procedural system and the role of happenstance thoroughly disrupt that relationship. As to procedure, under our system of notice pleading and liberal discovery, the cost of discovery overwhelmingly drives the cost of litigation.⁷³ Because of discovery’s expansiveness, a claim that turns on a pure question of law will usually require fewer attorney hours than a claim that turns on a pure question of fact, even if the question of law requires overturning precedent and the question of fact has an overwhelmingly likely answer.⁷⁴

As to happenstance, a law firm deciding whether to take on a client cannot know whether a pending cert petition will result in an unfavorable change in the law, whether the claimant’s key witnesses will become unavailable before their deposition or trial (e.g., because they are sick or elderly), or whether an unsympathetic trial judge or appellate panel will be randomly assigned to the case.⁷⁵ Those types of possibilities have a significant impact on the claimant’s initial likelihood of

70. *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992) (“[N]o claim has a 100% chance of success . . .”). 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 Emp’t Opportunity Comm’n, 434 U.S. 412, 422 (1978).

71. To the extent that one might question the extent to which fee awards should be enhanced “in cases in which the probability of a plaintiff victory is low,” Hylton, *supra* note 28, at 1115, that question goes to *how* rather than *whether* risk-bearing services should be compensated. In particular, it raises the possibility that some lower-probability claims should result in no more compensation than higher-probability claims. *See infra* Sections IV.B–C.

72. *See infra* notes 141–143 and accompanying text.

73. *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 100 (2009) (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 357); *see also* Robin J. Effron, *Putting the “Notice” Back into Pleading*, 41 CARDOZO L. REV. 981, 1007 (2020) (explaining that notice pleading “shift[ed] the meritoriousness problem away from pleading and into discovery and later stages of litigation”).

74. Even difficult legal research generally takes less time than preparing for and conducting depositions of fact witnesses, preparing for and conducting depositions of expert witnesses, drafting and responding to interrogatories and requests for admission, putting together motions for summary judgment, and the like.

75. *Cf. Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010) (arguing that an unexpectedly favorable outcome “may result from inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck”).

success,⁷⁶ but the claimants' attorneys can do little or nothing to avoid them,⁷⁷ so they will have little to no impact on the lodestar amount.

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.⁷⁸ 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."⁷⁹ 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 stockbroker 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.⁸⁰ For a worker

76. For example, different judges will make different decisions based on identical evidence, case law, and arguments, both at the trial and appellate levels. *See* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 115 (2017) ("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."). Moreover, as the abuse of discretion standard recognizes, some trial-court decisions can legitimately go either way.

77. For example, an attorney might draw on her skill and experience when choosing where to file a complaint (if the constraints of jurisdiction and venue allow for such a choice), but the assignment of a particular district judge will usually be made at random. *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."). Similarly, appellate panels are configured semirandomly. *See generally* Levy, *supra* note 76.

78. 505 U.S. 557 (1992).

79. *Perdue*, 559 U.S. at 550 (noting that fee-shifting statutes "do[] 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").

80. *Cf. Reynolds 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 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.").

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 \$4800 and \$5800.⁸¹ 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.⁸²

Other claimants who seek representation will be interested only in pursuing injunctive relief,⁸³ 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 private plaintiffs to recover damages.⁸⁴ Under the Eleventh Amendment, "[s]tates and state officers acting in their official capacity are immune from suits for damages in federal court,"⁸⁵ 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."⁸⁶ When an injunction or award of nominal damages is the only relief pursued or the only relief available, the contingent percentage fee will not provide a financial incentive for a law firm to take on the representation.⁸⁷

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."⁸⁸ Moreover, "[a] rational, profit-maximizing attorney will prosecute a plaintiff's claim if and only if the expected payment from

81. The \$14,500 figure is based on 40 hours per week for 50 paid work weeks at the federal minimum wage of \$7.25 per hour. The \$4800 and \$5800 figures are based on a 33% and 40% contingent percentage fee, respectively.

82. 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 Frequently Asked Questions about the Time's Up Legal Defense Fund and the Legal Network for Gender Equity*, NAT'L WOMEN'S L. CENT., <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> [<https://perma.cc/36QK-H5KW>] ("[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.").

83. For a discussion of claimants who seek only injunctive relief, see *supra* notes 26–27 and accompanying text.

84. *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 4–5 (2006).

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

86. *Malley v. Briggs*, 475 U.S. 335, 335 (1986).

87. *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").

88. *Hylton*, *supra* note 28, at 1114.

the client exceeds the cost of prosecuting the claim.”⁸⁹ Those conditions mean that economically rational clients will not generally pursue civil rights claims for injunctive relief or nominal damages,⁹⁰ even if no other type of relief is available. Such claims thus fall into gaps in the market for legal services.⁹¹

Congress could have addressed these market gaps in a number of different ways,⁹² but it chose—repeatedly, and at very different points in time—to enact fee-shifting statutes.⁹³ Its reasoning often sounded in concerns about government resources and policy drift. In support of the Civil Rights Attorney’s Fees Awards Act of 1976,⁹⁴ 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.”⁹⁵

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.⁹⁶ A law firm

89. *Id.*

90. Under some circumstances, even an economically rational claimant might seek only 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.

91. 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 28, 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 . . .”).

92. 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.

93. *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.”).

94. 42 U.S.C. § 1988 (2012).

95. 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).

96. *See Silver*, *supra* note 69, 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.”) (emphasis in original).

can enter into a variety of arrangements with a client who holds this potential entitlement to fees. Three such arrangements are especially relevant here.⁹⁷

First, and most commonly, the client might convey the fee entitlement to the law firm in exchange for representation.⁹⁸ Under this arrangement, any payment the firm receives for representing the client will come directly from the defendant.⁹⁹ 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.¹⁰⁰

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 percentage of the monetary recovery *or* the full fee-shifting award, whichever is greater.¹⁰¹ If the plaintiff wins and obtains a large enough monetary recovery, the firm will receive a percentage of that recovery;¹⁰² if the plaintiff achieves “prevailing party” status but obtains a smaller monetary recovery, the firm will receive the fee-shifting award,¹⁰³ 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.¹⁰⁴ 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

97. 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.

98. Silver, *supra* note 69, at 877.

99. 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.

100. See *supra* notes 31–35 and accompanying text.

101. 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* Section I.A.)

102. 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).

103. 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).

104. 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.

of the outcome.¹⁰⁵ Accordingly, this third type of arrangement does not involve the provision of risk-bearing services, and this Article's discussion of compensation for risk should generally be read to exclude it.

The possibility of a noncontingent 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?¹⁰⁶ That question can be answered by reference to the purpose of fee-shifting statutes—to encourage private enforcement of the specified laws¹⁰⁷—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.¹⁰⁸ An indigent client does not truly choose a contingent fee arrangement; rather, unless a law firm agrees to represent her for free,¹⁰⁹ 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.¹¹⁰

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.¹¹¹ 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.”¹¹²

105. *Cf.* *Pennsylvania v. Del. 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).

106. *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).

107. *See, e.g., Newman v. Piggie Park Enters., 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* Section II.A.1.

108. “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); *see also* LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017) (finding that “71% of low-income households experienced at least one civil legal problem” in the prior year but “86% of [those] civil legal problems . . . received inadequate or no legal help”).

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

110. *See* RHODE, *supra* note 108, at 14.

111. *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.”).

112. *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010).

3. Market Rates

As legislative history makes clear, Congress intended for statutes like 42 U.S.C. § 1988¹¹³ to “enabl[e] vigorous enforcement of modern civil rights legislation,” which “reflects a heavy reliance on attorneys’ fees” in order to secure compliance.¹¹⁴ 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.”¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

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 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

113. Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012).

114. S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 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 5.

115. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

116. For a discussion of such market gaps, see *supra* Section II.A.1.

117. See *supra* Section 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.”).

118. See Hylton, *supra* note 28, 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”).

computing the value of attorneys' services."¹¹⁹ 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,¹²⁰ it likewise did not prohibit contingency adjustments—though neither did it embrace them.¹²¹

By the mid-1980s, most of the federal appellate courts had allowed contingency enhancements to the lodestar in statutory fee-shifting cases.¹²² The predominant 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 10% or 50%, while others multiplied the lodestar by the inverse of the case's initial likelihood of success.¹²³

Although most scholars agreed that fee-shifting awards should include compensation for risk, many criticized these case-specific approaches.¹²⁴ 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.¹²⁵ 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.¹²⁶

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

120. *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.").

121. *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.").

122. *See Pennsylvania v. Del. 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.").

123. 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.

124. *See Rowe*, *supra* note 28, at 632 (discussing the prevailing scholarly view); *see, e.g., Leubsdorf*, *supra* note 33.

125. *See Leubsdorf*, *supra* note 33, at 474; *see also Rowe*, *supra* note 28, 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.").

126. *Leubsdorf*, *supra* note 33, at 483.

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.¹²⁷ Viewed on an ex ante basis from the plaintiff's side, 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.¹²⁸ By contrast, a risk-averse law firm would prefer the case with 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).¹²⁹ Because the former cost would come to fruition only if the plaintiff achieved "prevailing party" status,¹³⁰ however, the two cases would have the same expected value from an ex ante perspective.¹³¹ Accordingly, a perfectly risk-neutral defendant would not fear one more than the other.¹³² By contrast, a risk-averse defendant would be more

127. *See 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 . . .").

128. *See infra* note 131. 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 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 CAPITAL, FINANCE FOR THE FUTURE OF LAW: HOW BURFORD HELPS LAW FIRMS 4 (2018). For further discussion of TPLF, see *infra* Section III.E.

129. Rowe, *supra* note 28, 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 . . .").

130. Instead of aggressively defending a low-probability claim, and thereby risking a loss on the merits, a defendant might choose to settle. Under those circumstances, one would expect a rational defendant to discount its settlement offer (with respect to both merits and fee liability) by its calculation of the plaintiff's likelihood of success.

131. 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 successful but initially higher-risk cases, see *supra* Section I.B, that would be so regardless of how the risk multiplier were set.)

132. 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,

fearful of the case with the higher multiplier (and the correspondingly lower likelihood of success).¹³³

Due to the foregoing concerns about case-specific risk multipliers, some scholars favored the use of a uniform multiplier (i.e., one that would not vary with the characteristics of a particular case).¹³⁴ The Supreme Court had an opportunity to weigh in on the question in 1987, but the case did not result in a majority opinion.¹³⁵ A four-Justice plurality would have held that risk enhancements should almost never be permitted;¹³⁶ a four-Justice dissent would have held that risk enhancements should always be required;¹³⁷ 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.¹³⁸ 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*.”¹³⁹

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.¹⁴⁰ 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.¹⁴¹ 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.”¹⁴² Accordingly, in the

and the amount of liquid assets available to it.

133. It would be inappropriate to recognize this defense-side risk aversion without also recognizing plaintiff-side risk aversion. *Cf.* Schwartz, *supra* note 17, at 310 (discussing the “disingenuousness” of “tears for defendants settling to avoid bankruptcy but apparent indifference to victims settling to avoid destitution”).

134. Leubsdorf, *supra* note 33, at 474–75.

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

136. *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.”).

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

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

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

140. *City of Burlington v. Dague*, 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.*

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

142. *Id.* As discussed previously, contrary to the Court's statement, lodestar values do not vary in direct relation to litigation risk. *See supra* Section I.B.

Court's view, the product of hours times hourly rates already includes compensation for contingent risk—despite being based on noncontingent rates.¹⁴³

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.”¹⁴⁴ As noted above, this concern arises from the use of risk enhancements determined on a case-by-case basis.¹⁴⁵ Accordingly, it would not be implicated by a standardized adjustment of the type Justice O'Connor had suggested a few years earlier.¹⁴⁶

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.¹⁴⁷ (In any case with a below-average chance of success, a uniform enhancement would result in an undercompensatory fee, but—perhaps tellingly—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 pay for the attorney's time (or anticipated time) in cases where his client does not prevail.¹⁴⁸

The Court turned next to its prior decisions about the interaction between fee-shifting awards and percentage-based retainer agreements.¹⁴⁹ Drawing on that case

143. 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).

144. *Dague*, 505 U.S. at 563. This analysis rests on an insupportable view of the relationship between litigation risk and merit. *See supra* Section I.B.

145. *See supra* notes 127–28 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* Section IV.B.4.

146. An article cited in the *Dague* majority opinion made this very point. *See* Leubsdorf, *supra* note 33, at 474; *see also* *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring).

147. *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* Section IV.C.

148. *Dague*, 505 U.S. at 565. For responses to this concern about payment for work on unsuccessful cases, *see infra* Sections III.A, III.B.

149. *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).

law, the Court asserted that it had “generally turned away from the contingent-fee model . . . to the lodestar model.”¹⁵⁰ It thus refused “to concoct a hybrid scheme” with features of both.¹⁵¹ Because fee-shifting awards are contingent upon prevailing-party status, however, the contingency ingredient in that concoction cannot be avoided.¹⁵²

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.”¹⁵³ 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.¹⁵⁴

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 Hospitals, Inc. v. Casey*,¹⁵⁵ which held that the statutory authorization of a “reasonable attorney’s fee” does not include expert witness fees.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

150. *Dague*, 505 U.S. at 565–66.

151. *Id.* at 566.

152. *See Silver*, *supra* note 28, 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.”) (emphasis omitted).

153. *Dague*, 505 U.S. at 566. For a discussion of some state courts’ rejection of this concern, *see infra* Section III.A.

154. *See infra* Section 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* Section IV.B.3.

155. 499 U.S. 83 (1991).

156. *Id.* at 102. Congress partially abrogated this decision in the Civil Rights Act of 1991. Pub. L. 102-166, 105 Stat. 1071 (1991); *see also* 42 U.S.C. § 1988(c) (2012).

157. *Casey*, 499 U.S. at 89.

158. *Id.* at 92.

159. 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

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.”¹⁶⁰ Instead, the Court has determined that the statutory language “must refer to a reasonable fee for the work product of an attorney.”¹⁶¹ Such a fee “must take into account the work not only of attorneys, but 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.”¹⁶² 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.¹⁶³

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,¹⁶⁴ statutory fee-shifting awards are structurally undercompensatory.¹⁶⁵ 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.¹⁶⁶

With regard to wholly profit-motivated counsel, this prediction has largely proven true.¹⁶⁷ Highly skilled attorneys do represent some plaintiffs in fee-shifting cases, but

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).

160. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

161. *Id.*

162. *Id.*

163. Cf. Morris A. Ratner, *Class Counsel as Litigation Funders*, 28 GEO. J. LEGAL ETHICS 271, 293–95 (2015) (arguing that courts should treat “litigation funding and insurance against the possibility of non-recovery” as “professional” services for purposes of ethical rules governing profit-making).

164. See *supra* notes 43–47 and accompanying text; see generally Karlan, *supra* note 1.

165. See Bagenstos, *supra* note 84, at 10–11 (“[U]nder the Supreme Court’s interpretation of the fee-shifting statutes, practitioners who rely on statutory attorneys’ fees will always earn lower effective hourly rates than similarly credentialed practitioners with fee-paying clients.”).

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

167. See, e.g., Green, *supra* note 15, at 1330 (“[D]espite the fee shifting statutes that permit

much of that representation occurs on a pro bono or nonprofit basis.¹⁶⁸ Those types of legal work, in turn, account for too small 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,”¹⁶⁹ and “pro bono service occupies less than one percent of lawyers’ working hours.”¹⁷⁰ “[C]ivil legal aid programs now reflect less than one percent of the nation’s legal expenditures,”¹⁷¹ and “[f]ewer than one in ten lawyers accept referrals from legal aid programs or groups serving low-income communities.”¹⁷² Public interest law organizations operate on a shoestring budget, but they still must turn down promising fee-shifting cases because they cannot afford to bring them.¹⁷³

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.¹⁷⁴ The functioning of the contingent percentage fee, however, depends on the availability of a sufficient amount of monetary relief.¹⁷⁵ 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 has nothing to do with fee-shifting statutes. Nor does that business model provide counsel for claimants who seek only injunctive relief or relatively low amounts of damages.¹⁷⁶

the prevailing party to collect attorneys’ fees from the employer, workers with small dollar [wage theft] claims are rarely able to secure representation. Legal aid organizations and law school clinics positioned to take cases without concern for the likelihood they will receive attorneys’ fees are the exception to that rule.”); Reingold, *supra* note 24, at 41 (“[P]rivate 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.”).

168. 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 now common, it is also deeply 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).

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

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

171. *Id.*

172. *See* Rhode, *supra* note 169, at 887.

173. *See, e.g.,* Margo Schlanger, *The Just-Barely Sustainable California Prisoners’ Rights Ecosystem*, 664 ANNALS AM. ACAD. 62, 75–76 (2016). For financial reasons, at least one private public-interest law firm generally avoids fee-shifting cases in which the claimant seeks only injunctive relief. *See* Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 87–88 (2012).

174. *See* Reingold, *supra* note 24, 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).”).

175. *See supra* Section II.A.1.

176. *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.”).

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 nonprisoner civil rights cases filed in 2015, more than a quarter (26%) involved a pro se plaintiff suing a represented defendant.¹⁷⁷ Moreover, research confirms the unremarkable proposition that “[p]laintiffs who proceed on their own rarely do so with success.”¹⁷⁸ 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 litigants,¹⁷⁹ however, makes it hard to know how many of those litigants might otherwise have prevailed.¹⁸⁰ 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.¹⁸¹

The structurally undercompensatory 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.¹⁸² 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.

177. By contrast, less than 2% 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. *Integrated Database (IDB)*, FED. JUD. CTR., <https://www.fjc.gov/research/idb> [https://perma.cc/Y9CB-L83K].

178. Daniels & Martin, *Texas Plaintiffs’ Practice*, *supra* note 32, at 287. For example, among inmate civil rights cases terminated in 2000, “counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff’s victory at trial.” Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610 (2003).

179. See, e.g., RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING 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”).

180. See Schlanger, *supra* note 178, at 1613–14 (“[W]ithout data, there is really no way to know which effect dominates—the depression of success rates because lawyers are absent, or the absence of lawyers because the cases are not very good cases. What is clear is that both effects operate . . .”).

181. 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, 636 (1981) (examining the mechanisms through which “only a small fraction of injurious experiences ever mature into disputes”).

182. See Silver, *supra* note 28, at 304–05 (evaluating these possibilities).

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,¹⁸³ 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 “amount[] to double counting” (because such compensation is already provided through the lodestar),¹⁸⁴ would be judicially unworkable,¹⁸⁵ would unduly encourage non-meritorious litigation,¹⁸⁶ and would improperly compensate counsel for cases in which the plaintiff’s law firm did not prevail,¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ Some of those statutes are interpreted in lockstep with their federal counterparts, whether because of a statutory provision to that effect,¹⁹¹ or because courts have required consistency between state and federal fee-shifting standards.¹⁹² For the statutes

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

184. *City of Burlington v. Dague*, 505 U.S. 557, 562–63 (1992).

185. *Id.* at 566.

186. *Id.* at 562–63.

187. *Id.* at 565.

188. See *supra* Section II.B.

189. 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).

190. 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., *Poliselli 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.”).

191. See, e.g., FLA. STAT. § 760.11 (2015) (“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.”).

192. See, e.g., *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897–98 (Iowa 1996) (“[T]he

interpreted in this manner, *Dague* directly resulted in the elimination (or prevention) of contingency enhancements.¹⁹³

More interesting are the state fee-shifting statutes that have required an independent conclusion about compensation for risk.¹⁹⁴ The courts of multiple states have deemed such compensation to be permissible,¹⁹⁵ and they have provided for case-specific (rather than uniform) compensation for risk.¹⁹⁶ For example, the New

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.”).

193. *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).

194. Some state statutes and procedural rules explicitly require courts to consider contingent risk when setting fee amounts. *See, e.g.,* IDAHO R. CIV. P. 54 (requiring courts to consider “whether the fee is fixed or contingent” when determining the amount of attorney fees); WIS. STAT. § 814.045(1)(k) (2011) (same); WYO. STAT. ANN. § 1-14-126 (2019) (same).

195. *See 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)); *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.”); *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”); *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)); *Rendine v. Pantzer*, 661 A.2d 1202, 1228 (N.J. 1995); *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 499 n.10 (Tex. 2019) (authorizing courts to consider “the attorney’s risk in accepting [the] representation” when determining market rates for purposes of fee-shifting awards); *USA Power, LLC v. PacifiCorp*, 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); *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”); *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).

196. *See, e.g., Silver Creek Invs., 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

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.”¹⁹⁷

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.”¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰

Similarly, when the Supreme Court of Florida reaffirmed the permissibility of case-specific compensation for risk under a state fee-shifting statute in 2017,²⁰¹ 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.’”²⁰² 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.”²⁰³

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 compensation for risk,²⁰⁴ a far richer body of scholarship is now available about the mechanics of private contingency practice.²⁰⁵ Herbert Kritzer’s study of Wisconsin contingent-fee lawyers in the mid-

marks omitted).

197. *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,] *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).

198. *Schefke*, 32 P.3d at 97.

199. *Id.*

200. *Id.* (quoting Silver, *supra* note 28, at 332).

201. *Joyce*, 228 So. 3d at 1132.

202. *Id.* at 1133 (quoting *Dague*, 505 U.S. at 566).

203. *Id.* at 1132–33.

204. *Dague*, 505 U.S. at 565; *see also supra* Section II.C.

205. *See supra* note 32.

1990s is particularly instructive.²⁰⁶ Contrary to the Court's characterization of such attorneys, Kritzer found that they behaved not like risk-loving gamblers,²⁰⁷ but like risk-balancing investment managers.²⁰⁸

The attorneys Kritzer studied sought to put together a portfolio of cases with a healthy balance of risks and rewards.²⁰⁹ In order to maintain that balance, the attorneys agreed to represent only about half of the potential clients who contacted them.²¹⁰ 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."²¹¹

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.²¹² 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).²¹³ Like other contracts involving financing and insurance, a contingent-fee agreement is informed by the value of the risk-bearing services to be provided.²¹⁴ 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.²¹⁵

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."²¹⁶ To be sure, successful contingent-fee cases subsidize

206. See generally KRITZER, REPUTATIONS AND REWARDS, *supra* note 32 (discussing the Wisconsin study); Kritzer, *Wages of Risk*, *supra* note 32 (same).

207. See *Dague*, 505 U.S. at 565.

208. See KRITZER, REPUTATIONS AND REWARDS, *supra* note 32, at 15–16.

209. See *id.*

210. *Id.* at 71.

211. *Id.* at 18; see also Daniels & Martin, *Texas Plaintiffs' Practice*, *supra* note 32, 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.").

212. Kritzer, *Wages of Risk*, *supra* note 32, at 270.

213. *Id.* at 270–71; see also *supra* notes 33–35 and accompanying text.

214. Kritzer, *Wages of Risk*, *supra* note 32, at 270.

215. *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 32, at 287–88.

216. *City of Burlington v. 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

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.²¹⁷ Private contingency arrangements, however, almost never take the form of a wholly contingent hourly fee.²¹⁸ The vast majority of 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.²¹⁹

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.²²⁰ In such cases, limiting a fee-shifting award to a percentage of the monetary recovery would undervalue the public benefits of the litigation.²²¹ 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."²²²

fee prevails.").

217. *Cf. Rendine v. Pantzer*, 661 A.2d 1202, 1230 (N.J. 1995) (quoting MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 16.04[4][b] (rev. ed. 1990)) ("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.'").

218. See KRITZER, REPUTATIONS AND REWARDS, *supra* note 32, at 40; see also Silver, *supra* note 20, at 36–37 (describing the contingent hourly fee as a mechanism that "the market squarely rejects"). As discussed *infra* Section III.D, some law firms offer *partially* contingent hourly rates as an alternative to traditional hourly billing.

219. 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 32, at 39. Under some contingent-fee contracts, the percentage varies according to the stage at which the case is resolved. See *infra* note 223. 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.

220. *Cf. Dague*, 505 U.S. at 565–66 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).

221. See *Blanchard v. Bergeron*, 489 U.S. 87, 93 (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").

222. *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.").

The percentages charged on the contingent-fee market typically fall into a narrow range, between 33 and 40%,²²³ with a one-third fee being most common.²²⁴ Moreover, individual law firms tend not to tailor their percentage rates to the level of risk presented by each particular case.²²⁵ This convergence among and within law firms suggests that some standardization of risk multipliers in statutory fee-shifting cases would be appropriate.²²⁶

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.²²⁷ 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, the mechanics of contingent-fee

223. Kritzer, *Dogged Myths*, *supra* note 219, at 740; *see also* KRITZER, REPUTATIONS AND REWARDS, *supra* note 32, 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 32, at 40. In the early days of the American contingency fee, rates often amounted to 50% 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).

224. *See* Kritzer, *supra* note 219, 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 32, 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”).

225. *But see* KRITZER, REPUTATIONS AND REWARDS, *supra* note 32, 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 versus medical malpractice).

226. 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 48 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 32, 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.*

227. 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 87, at 707–08.

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.²²⁸ As with statutory fee shifting, the court’s charge is to award a “reasonable” fee, and private-market rates provide the touchstone for reasonableness.²²⁹ Notwithstanding these similarities, courts follow a different set of rules for calculating common-fund awards than for statutory fee-shifting awards.²³⁰ Most important for present purposes, federal courts are permitted to include compensation for risk in common-fund awards.²³¹

Courts use both the lodestar and the percentage method to calculate common-fund awards, though the latter approach is far more common.²³² When courts use the lodestar method, they are permitted to award compensation for risk by way of a risk multiplier.²³³ (This use of risk multipliers is inconsistent with the proposition, tentatively advanced by the Court in *Dague*, that the lodestar already compensates for risk.)²³⁴ When courts use the percentage method, they tend to award higher percentages in high-risk cases than in low- and medium-risk cases.²³⁵ Either way, as the authors of one study put it, “courts systematically reward risk” in common-fund

228. 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.”).

229. See Ratner, *supra* note 163, at 310 (discussing common-fund awards); *supra* Section II.A (discussing statutory fee-shifting awards).

230. See WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 15:90 (5th ed., 2015); see also Ratner, *supra* note 163, at 279–80 & 280 n.35.

231. 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.”).

232. See Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys’ Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 945 (2017) (finding that courts used the percentage method—either alone or with a lodestar cross-check—in about 92% of the class actions studied, and that courts used 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 STUD. 248, 267–68 (2010) (finding that courts used the percentage method—either alone or with a lodestar cross-check—in about 80% of the class settlements studied, and that courts used 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 STUD. 811, 832 (2010) (finding that courts used the percentage method in 69% and the lodestar method alone in 12% of the class settlements studied).

233. See, e.g., *Staton*, 327 F.3d at 967; see also Fitzpatrick, *supra* note 232, at 835.

234. See *supra* Section II.C; see also *supra* Section I.B (explaining why the lodestar does not vary in direct relation to the initial level of litigation risk).

235. Eisenberg & Miller, *supra* note 232, at 278.

cases.²³⁶ 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.”²³⁷

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,²³⁸ 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.”²³⁹ 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.”²⁴⁰ 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,²⁴¹ 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: (i) the defendant’s culpability were proportional to the plaintiff’s initial litigation risk, and (ii) fee-shifting awards were meant to be proportional to that culpability. If both of those propositions were true, courts might deem it inappropriate to award higher fees in cases that were in some sense close—for example, because the defendant’s conduct was not so egregious or obviously unlawful that the plaintiff’s victory was assured.²⁴² 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.”²⁴³

Both of the underlying propositions fail. First, litigation risk does not increase in direct proportion to the defendant’s culpability; in fact, the opposite can be true. Consider that, although lying is culpable behavior, it can be riskier to sue a police officer who is willing to lie than one who is committed to telling the truth.²⁴⁴

236. *Id.* at 265; *see also* Eisenberg et al., *supra* note 232, at 958 (finding that “the association between risk and fee percentage continues in the 2009-2013 data” but “is not as clear-cut”).

237. *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

238. For discussion of the “prevailing party” restriction, *see supra* Sections III.A & III.B.

239. *Rowe*, *supra* note 106, at 662.

240. *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002).

241. *Id.*

242. *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.”).

243. *Id.*

244. Such a willingness to lie is disturbingly common. *See Rachel Moran, Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1342 (2018) (“[T]he phenomenon of police officers lying at trial is so well documented that it has its own euphemism, ‘testilying’ . . .”).

Similarly, although witness intimidation is culpable behavior, it can be riskier to sue a sexual harasser who has silenced or intimidated his other victims than one who has admitted wrongdoing and attempted to make amends.²⁴⁵ Moreover, even if a defendant has engaged in egregious behavior—for example, by forcing a prisoner to sleep naked on the floor in cells “teeming with human waste” for six days²⁴⁶—he might have a plausible argument that an affirmative defense, statutory exception, or immunity doctrine protects him from liability.²⁴⁷ Not all paths to a potential defense victory run through morally vindicating terrain, yet all initially present some amount of risk, even if the plaintiff ultimately prevails.

Second, the purpose of a fee-shifting statute is not to heap additional punishment on a losing defendant, but “to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.”²⁴⁸ 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.²⁴⁹ 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 successful but initially higher-risk cases, then any culpability-based “concern[s] about financially burdening a defendant to compensate for the risk of nonpayment”²⁵⁰ 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.

Counsel wishing to challenge an officer’s credibility, however, face serious obstacles in obtaining and presenting the evidence necessary to do so effectively. *Id.* at 1342–43.

245. Cf. Susan Faludi, *‘She Said’ Recounts How Two Times Reporters Broke the Harvey Weinstein Story*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/books/review/she-said-jodi-kantor-megan-twohey.html> [https://perma.cc/4YVS-HEAC] (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), <https://www.nytimes.com/2019/10/11/books/review-catch-kill-ronan-farrow-harvey-weinstein.html> [https://perma.cc/E4HV-EG39] (describing the pressure brought to bear against reporting on the Weinstein allegations).

246. *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019). The defendant prison officials won summary judgment on the basis of qualified immunity, *see id.* at 222, but they could hardly claim blamelessness.

247. 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) (detailing that 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).

248. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. NO. 94-1558, pt. 1 (1976)).

249. *See Hensley*, 461 U.S. at 429.

250. *Fischel*, 307 F.3d at 1008.

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,²⁵¹ and in response, private law firms have increasingly offered alternative fee arrangements (AFAs) to their clients.²⁵² 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.²⁵³

One type of risk-sharing AFA is sometimes called a "partial contingency fee."²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ The agreement provided that the defendant would pay an up-front flat fee of \$25,000, which the firm would keep regardless of the outcome.²⁵⁷ If the defendant's motions were granted, it would then pay a "success fee" amounting to 150% of the firm's regular rates.²⁵⁸ 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*."²⁵⁹ 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.²⁶⁰

251. See, e.g., A.B.A., ABA COMMISSION ON BILLABLE HOURS REPORT 2001-2002 (2002); WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS (1996); David Graeler & Thomas D. Long, *The End of the Hour*, L.A. LAW., Sept. 2014, at 28.

252. Ellen Freedman, *Alternative Fee Arrangements: Not a Passing Fad*, PA. LAW., 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, 156 n.2, 226 (2012) (noting the "decided trend against the use of billable hours for legal services").

253. See ALM LEGAL INTELLIGENCE, WHO REALLY DRIVES AFA USE—AND WHY? 9 (2015).

254. See *Brief for Law and Economics Scholars as Amici Curiae Supporting Respondents* at 10–11, *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2009) (No. 08-970), 2009 WL 2777659.

255. *Id.*

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

257. *Id.*

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

259. *Id.* (emphasis added).

260. Similarly, in Kirkland & Ellis's 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."

The Supreme Court discussed risk-sharing AFAs in its 2010 decision in *Perdue v. Kenny A.*²⁶¹ There, the district court had awarded a lodestar enhancement for counsel's "superior performance and results."²⁶² The Court rejected the plaintiffs' argument that the performance enhancement was analogous to a partial contingency fee,²⁶³ 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.²⁶⁴

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 much better than expected (e.g. in light of the attorneys' relative inexperience) that additional compensation is appropriate.²⁶⁵ 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.²⁶⁶

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.

KIRKLAND & ELLIS LLP, ALTERNATIVE FEE ARRANGEMENTS AND LITIGATION FINANCE 2. Because it ties the risk premium to the amount of the actual recovery, this AFA depends on case-specific factors. See Kubicz Hall, *supra* note 252, 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").

261. 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").

262. *Id.* at 546.

263. *Id.* at 556–57.

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

265. See *id.* at 543 (noting that a performance enhancement may be appropriate, when an attorney's hourly rate has been determined solely on the basis of years since admission to the bar, if that method "does not adequately measure the attorney's true market value, as demonstrated in part during the litigation").

266. When a plaintiff obtains a successful result in spite of the risks initially presented by a case, "the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel," but it might also result from "simple luck." *Id.* at 554.

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.²⁶⁷ 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.”²⁶⁸ Particularly relevant here, one form of TPLF involves plaintiff-side, case-specific, nonrecourse loans.²⁶⁹ In this type of loan, if the case results in no recovery, the borrower owes the lender nothing;²⁷⁰ but if the plaintiff prevails, the lender recovers the initial investment plus a substantial fee.²⁷¹ 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.²⁷² 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.)²⁷³

267. 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).

268. 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 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, KNOWN, AND UNKNOWN 9–12 (2010).

269. Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 394 (2014). 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).

270. The borrower can be either the plaintiff or her law firm. GARBER, *supra* note 268, at 15–16.

271. Engstrom, *supra* note 269, 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* 534 (2007) (“The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.”).

272. 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, 907 (2015).

273. Engstrom, *supra* note 269, 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.”).

“Legal claims are notoriously difficult to value,”²⁷⁴ and the expected value of the claim is central to the value of the TPLF transaction.²⁷⁵ Accordingly, these funders engage in a significant amount of due diligence before taking on any particular case.²⁷⁶ 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.”²⁷⁷ Similarly, funder Burford Capital states that its transactions are “individually negotiated.”²⁷⁸ 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.”²⁷⁹ The TPLF market thus provides some support for a case-specific approach to compensation for risk in federal statutory fee-shifting cases.

Because of the time and expense involved in these due-diligence processes, however, the TPLF market also suggests that case-specific multipliers could raise serious administrability concerns. TPLF provider Burford Capital, for example, reports that its due diligence process “typically takes at least 60 days.”²⁸⁰ TPLF provider Juridica, which describes a similar time frame, reports that it “spends an average of \$75,000–\$100,000 for each screening.”²⁸¹ Requiring a similar level of analysis for the purpose of setting a case-specific risk multiplier would place a heavy burden on courts and litigants.

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, they will be highly unlikely to do so unless the case also happens to involve a large potential monetary recovery.²⁸² But these lenders focus on complex cases, and Congress intended that statutory fee-shifting awards should “be governed by the

274. Steinitz, *supra* note 273, at 1171.

275. 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).

276. 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.” *What Does Burford Do?*, BURFORD, <https://www.burfordcapital.com/faqs/> [<https://web.archive.org/web/20190913142718/https://www.burfordcapital.com/faqs/>].

277. *Generating Multi-Million Dollar Revenues with Funding*, BENTHAM IMF, <https://www.benthamimf.com/funding/case-studies/case-study/generating-multi-million-dollar-revenues-with-funding> [<https://perma.cc/V75Z-LH75>].

278. *What Does Burford Do?*, *supra* note 276.

279. *Id.*

280. Ashley Keller & Katharine Wolanyk, *What You Need To Do Before Obtaining IP Litigation Financing*, BURFORD (June 26, 2017), <https://www.burfordcapital.com/media-room/media-room-container/what-you-need-to-do-before-obtaining-ip-litigation-financing/> [<https://perma.cc/5R57-6T8G>].

281. Ralph Lindeman, *Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits*, BUREAU OF NATIONAL AFFAIRS: DAILY REPORTS FOR EXECUTIVES (Mar. 5, 2010), <https://fulbrookmanagement.com/third-party-investors-offer-new-funding-source-for-major-commercial-lawsuits/> [<https://perma.cc/UA3X-9PS2>].

282. See *supra* Section II.D. Cf. Yeazell, *supra* note 32, 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”).

same standards which prevail in other types of equally complex [f]ederal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature.”²⁸³ 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.

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

IV. EVALUATING THE ALTERNATIVES

The previous Part found that state fee-shifting awards, contingent percentage fees, common-fund awards, alternative fee arrangements, and third-party litigation funding provide support for the proposition that statutory fee-shifting awards should include case-specific compensation for risk. This Part turns to 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. The goal of this Part is to identify one or more approaches that would be workable and fair, both to plaintiffs and to defendants, especially in the context of injunctive and negative-value claims.

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.²⁸⁴ 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.²⁸⁵ 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

283. *Blum v. Stenson*, 465 U.S. 886, 893 (1984) (quoting S. REP. NO. 94–1011, pt. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913).

284. 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* Section I.A.

285. *See supra* note 223.

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-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. As noted previously, litigation risk in fee-shifting cases should be viewed from the perspective of a law firm deciding whether to represent a claimant.²⁸⁶ 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, and not to abandon the client while the litigation remains ongoing.²⁸⁷

Because of the undercompensatory status quo, an abandoned fee-shifting client would likely face tremendous difficulty finding new counsel.²⁸⁸ 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.²⁸⁹ This analysis suggests that stage-specific risk multipliers might be appropriate for statutory fee-shifting awards.

The best argument against stage-specific risk 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 and arbitrary, hence more unpredictable, and hence more litigable."²⁹⁰ To the extent that this concern has any validity for a case-specific approach,²⁹¹ 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

286. *See supra* Section I.B.

287. Ethical rules limit the circumstances under which an attorney can terminate representation. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (2018).

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

289. 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. *Cf.* Lindeman, *supra* note 281 (reporting that TPLF provider Juridica "has no preferred stage of litigation at which to become involved in a case" and "has taken cases that were freshly filed, on the eve of trial, as well on appeal").

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

291. *See supra* notes 201–03 and accompanying text (noting that the Florida Supreme Court has rejected this concern as unsupported); *see also infra* Section IV.B.2 (discussing an approach to case-specific multipliers designed to minimize this concern).

amounts associated with each of those stages.²⁹² Administrability and predictability thus weigh against determining and applying different multipliers for every stage of fee-shifting litigation.²⁹³

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-level 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.²⁹⁴

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 work performed in the trial court.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷ Moreover, the nature and timing of monitoring and enforcement should make the disaggregation of those hours from prejudgment 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 pre-judgment risk multiplier for a particular case. It would be reasonable, however, to apply different multipliers for the appellate and postdecree compliance stages than for the prejudgment phase.

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

293. 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.

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

295. *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.

296. *See Schlanger, supra* note 173, at 74.

297. *Id.* at 74, 79 n.2.

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 different multipliers would apply to different cases).²⁹⁸ As noted previously, the mechanisms discussed in Part III generally involve case-specific variations in compensation for risk.

Courts and commentators have identified significant concerns with case-specific multipliers,²⁹⁹ but many of those problems could be mitigated (though not eliminated) by implementation choices. The discussion that follows will explain how, under the following potential approach, that mitigation could occur:³⁰⁰

Table 1: Potential Case-Specific Approach to Risk Multipliers

Initial probability of complete success	Risk multiplier
20%	2.5
50%	1.8
80%	1.25

1. Timing and Relevant Considerations

Although this approach turns on the plaintiff's *initial* probability of complete success, as viewed from the standpoint of a reasonable attorney deciding whether to accept the representation,³⁰¹ the court need not evaluate that probability at the outset of the litigation. Such *ex ante* evaluation occurs in the contingent percentage fee, TPLF, and ALF contexts, but in those contexts, the provider and evaluator of

298. 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 Ratner & Rubenstein, *supra* note 22, at 609–11.

299. See *supra* Sections II.B–C.

300. For accessibility purposes, I note that the table describes a risk multiplier of 2.5 for cases with a 20% initial probability of complete success, a risk multiplier of 1.8 for cases with a 50% initial probability of complete success, and a risk multiplier of 1.25 for cases with an 80% initial probability of complete success.

301. Cf. *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.”); *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.”). If stage-specific multipliers are used, see *supra* Section IV.A, the viewpoint would be that of a reasonable attorney deciding whether to enter the lawsuit at the beginning of the relevant stage.

information are on the same side of the “v.” Federal fee-shifting is in that sense more similar to the state fee-shifting and common-fund contexts; there, the court must rely on the parties for the adversarial presentation of information, and the entire fee-setting process usually takes place after the litigation has ended. That timing raises concerns about predictability and hindsight bias, but it helps to avoid the conflicts of interest that could otherwise arise between plaintiffs and their counsel.³⁰²

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.³⁰³ Moreover, to avoid inviting duplicity or creating conflicts of interest for plaintiffs’ counsel,³⁰⁴ the estimate should be based on relatively objective considerations that (at the time of the fee petition) no longer affect the merits. For example, those case-specific considerations might include the following: whether the plaintiff’s claim could only succeed through a change to existing precedent, whether this claimant or any other plaintiffs had prevailed in similar claims against this defendant,³⁰⁵ whether other law firms had declined to represent the plaintiff in this case or to sue the same defendant in other cases,³⁰⁶ the extent to which the underlying issues implicate the defendant’s broader business interests,³⁰⁷ or how often defendants prevail outright in cases brought under this substantive law.³⁰⁸ This analysis would not entail a balancing test, with the goal of determining some abstract idea of reasonableness, but an evaluation of case

302. See *supra* Section II.B (discussing the possibility of such conflicts of interest).

303. The probability determination should reflect that if a reasonable attorney would 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*, 104 A.B.A. J. 32, 32 (2018); see also MP McQueen, *How Legal Departments Are Using New Data Tools, Tactics to Fight Megaverdicts*, CORP. COUNSEL (Dec. 2, 2019, 9:00 AM), <https://www.law.com/corpcounsel/2019/12/02/how-legal-departments-are-using-new-data-tools-tactics-to-fight-megaverdicts/?slreturn=20200104193834> [<https://perma.cc/CZ5P-X8UR>] (describing the use of quantitative tools to supplement, rather than supplant, attorney’s risk evaluations).

304. See *supra* Section II.B (discussing these concerns).

305. Cf. Keller & Wolanyk, *supra* note 280 (noting that prospective borrowers should be prepared to inform a TPLF provider about “any relevant prior litigation”).

306. 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.”).

307. See, e.g., *State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836, 837–38 (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).

308. See, e.g., *Palma*, 555 So. 2d at 958 (deeming it relevant to the risk assessment that “[d]efendants prevail outright in many securities suits”).

characteristics that bear on the discrete factual question of the plaintiff's initial probability of success.

2. Range of Multiplier Values

The multiplier values (2.5, 1.8, and 1.25) draw primarily from the federal common-fund and state fee-shifting contexts.³⁰⁹ In common-fund cases, courts can set multipliers based on litigation risk as well as other considerations,³¹⁰ and “most multipliers are in the relatively modest 1–2 range.”³¹¹ Compared to the approach discussed here, the floor is somewhat lower in common-fund cases, as some fee awards fall “at or just below counsel’s lodestar.”³¹² The ceiling is also somewhat higher, as dozens of reported cases involve multipliers greater than 3.5,³¹³ and some cases involve multipliers greater than 6.³¹⁴

The multipliers awarded in federal common-fund cases tend to be higher than the risk multipliers awarded under state fee-shifting statutes. In connection with the latter, for example, the Supreme Court of Florida has authorized multipliers up to 2.5.³¹⁵ For their part, the New Jersey and Hawaii Supreme Courts have imposed a

309. Under this potential approach, no case would receive a risk multiplier higher than 2.5. The imposition of a ceiling addresses concerns raised in the federal common-fund and state fee-shifting contexts, where courts have recognized the absurdity that could result if the risk multiplier were permitted to scale up indefinitely. 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 the proposition that a case can be deemed frivolous even if the plaintiff prevails.

310. For a discussion of the common-fund doctrine, see *supra* Section III.C.

311. WILLIAM B. RUBENSTEIN, *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 232, 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 232, at 965; another found a mean lodestar multiplier of 1.65, Fitzpatrick, *supra* note 232, at 834; and another found a mean lodestar multiplier of 1.81, Eisenberg & Miller, *supra* note 232, at 272.

312. RUBENSTEIN, *supra* note 311, § 15:89.

313. *Id.*

314. See Fitzpatrick, *supra* note 232, at 834.

315. 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*).

ceiling of 2 (i.e., doubling) for risk multipliers under their state fee-shifting statutes,³¹⁶ at least in nonclass cases.³¹⁷

Some AFAs and TPLF agreements also involve multiplier-like mechanisms, but the details of those transactions are rarely made public.³¹⁸ 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.³¹⁹ Some public information, however, suggests that the multiplier values discussed here might be somewhat similar to TPLF rates. For example, a 2009 lawsuit revealed that a law firm “agreed to pay back [TPLF provider Augusta Capital] not only the funded litigation expenses, but also a stipulated funding fee which ranged from 75% to 125% of the funded amount.”³²⁰ That fee would roughly correspond to a multiplier value between 1.75 and 2.25, putting it in the same ballpark as the range discussed here.

3. Quantization of Probability Values

This potential approach would not require a court to identify the risk initially presented by a case with mathematical exactitude. Instead, a court would choose which of the three buckets most accurately reflected the litigation’s initial probability of complete success.³²¹ Multiple benefits flow from this quantization. First, because

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

317. 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*, 2015 N.J. LAW. 69, 69. 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).

318. With regard to TPLF, the available information might soon increase. See, e.g., Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1077 (2019) (discussing proposed legislation that “would require disclosure of litigation funding arrangements in class actions and multidistrict litigation in federal courts to the court and to all parties”).

319. 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, 4:22 PM), <https://www.law360.com/articles/959672/3rd-party-funding-finding-a-home-in-patent-litigation> [https://perma.cc/54JQ-Q68D] (“It’s difficult to pinpoint how many patent cases involve third-party funders because the deals are often kept under wraps with nondisclosure agreements.”).

320. *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 Selwyn Seidel, Timothy Scrantom, Alan Zimmerman, Lee Drucker, John Desmarais & Radek Goral, *Panel 1: Litigation Funding Basics*, 12 N.Y.U. J.L. & Bus. 511, 528 (2016) (comments of John Desmarais, contingent-fee attorney) (describing agreements Desmarais 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”).

321. The use of three buckets resembles a quantitative-analysis product that “evaluates claims coming into a legal department and codes them red, yellow or green like a traffic light”

evaluation of this type of litigation risk is extremely difficult,³²² attempts at fine-grained accuracy would come at a high cost to judicial economy.³²³ There is no reason to think that federal judges have any particular expertise with regard to evaluating litigation risk, and there would be no reason to expect that they could do it easily or well.³²⁴ 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.”³²⁵ Allowing only three options certainly does not eliminate the possibility that courts will make an arbitrary or questionable choice, but as compared to asking courts to choose among the full range of probability values, it does reduce the costs to judicial economy and predictability.

Limiting the number of options also constrains, though does not eliminate, the costs that a party might bear because of judicial error. For a defendant, the worst-case scenario would be the low-risk case that a court erroneously classifies as high-risk. For a plaintiff, the worst-case scenario would be the high-risk case that the court erroneously classifies as low risk. Under the approach discussed here, such errors would lead to the fee award being inappropriately halved or doubled—a significant effect, to be sure, but a bounded one.

At the same time, limiting the number of risk-multiplier options would also have costs. Most significantly, it would reduce the court’s flexibility to make the multiplier value reflect the risk associated with the particular case. It might also increase the imprecision involved in the risk evaluation, because some cases will not have an initial probability of complete success that falls at one of the predetermined points. Any choice of a particular number of options will reflect a balance between these concerns about flexibility and precision, on the one hand, and concerns about administrability and predictability, on the other.³²⁶

Most of the cases in which courts issue federal statutory fee-shifting awards would likely fall into the 50% bucket. 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 a less than 50% likelihood of success. Similarly, few defendants are in a position to be truly risk neutral rather than risk averse, making them likely

based on the level of risk they present to the defendant. *See* McQueen, *supra* note 303.

322. *See* Osbeck, *supra* note 19, 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.”); *see also* MICHAELA KEET, HEATHER HEAVIN & JOHN LANDE, LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS xxi (2020) (explaining why “lawyers and parties often make errors” in their assessment of litigation risk).

323. *See supra* Section III.E (discussing the time and expense involved in claim valuation for purposes of TPLF investments).

324. A court could rely on experts or a special master for this purpose, but the potential increase in accuracy would come at a cost in both money and potential delay.

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

326. 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. *See infra* Section IV.C.

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).³²⁷ 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 2.5 or below 1.25.

4. Expected Value of Accepting Representation

The Supreme Court in *Dague*, like some other courts and commentators, assumed that a case-specific approach would require setting the multiplier to the exact inverse of the risk presented by a particular case.³²⁸ In keeping with that assumption, the Court expressed concern that a case-specific approach would create the same incentive for attorneys to bring high-risk cases as low-risk ones.³²⁹ Case-specific multipliers, however, need not take an exact-inverse approach nor create those incentives. For example, under the approach discussed here, the lowest-risk cases would have the highest expected-value fees.³³⁰

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

Initial probability of complete success	Risk multiplier	Expected value of representation
20%	2.5	50% of lodestar
50%	1.8	90% of lodestar
80%	1.25	100% of lodestar

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 the likelihood of obtaining

327. Because the lodestar value depends on the number of hours expended on the litigation, it is lower at earlier stages of a particular case. Moreover, even in the absence of settlement, a defendant can sometimes limit its fee exposure by making an offer of judgment. *See* FED. R. CIV. P. 68 (governing offers of judgment). If the plaintiff ultimately recovers a judgment less favorable than the unaccepted offer, the defendant will not be liable for any attorney's fees incurred after the offer was made. *See* *Marek v. Chesny*, 473 U.S. 1 (1985).

328. *Dague*, 505 U.S. at 563 (assuming that a claim with a 20% chance of success would require a multiplier of 5, and that a claim with an 80% chance of success would require a multiplier of 1.25); *see also supra* Sections II.B–C.

329. *Dague*, 505 U.S. at 563 (objecting that risk multipliers would “provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones”); *see also supra* notes 127–128 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).

330. For accessibility purposes, I note that the table describes an expected value of 50% of the lodestar for cases with a 20% initial probability of complete success and a risk multiplier of 2.5, an expected value of 90% of the lodestar for cases with a 50% initial probability and a risk multiplier of 1.8, and an expected value of 100% of the lodestar for cases with an 80% initial probability and a risk multiplier of 1.25.

that fee.³³¹ The expected values listed in this table reflect the role the latter plays in case selection decisions.³³²

If a case were to have an initial probability of complete success greater than 80%, the 1.25 multiplier value would result in an expected value in excess of the lodestar.³³³ This potential approach assumes that such cases would be filed so rarely that courts could reasonably treat them as nonexistent.³³⁴ More generally, it reflects the conclusion that the risk multiplier should have a floor as well as a ceiling,³³⁵ because “no claim has a 100% chance of success”³³⁶ and risk-bearing services have positive value. In the unlikely event that law firms were discovered to be routinely taking certain cases on contingency while charging only their standard noncontingent 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 judged to have less than an 80% initial 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 two buckets, under which law firms would 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,³³⁷ but also a recognition of the federal judiciary’s general parsimony when it comes to compensating plaintiffs’ counsel.³³⁸

331. See *supra* Section III.B (discussing the role of likelihood of success in case selection decisions in the context of contingent percentage fees).

332. This table reflects two simplifying assumptions. First, the expected-value calculation assumes that cases can only completely succeed or completely fail. See *supra* note 131. Second, it treats the lodestar as a value that does not depend on a case’s likelihood of success. See *supra* Section I.B.

333. 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 earlier, see *supra* note 332.)

334. Cf. J.B. Heaton, *The Siren Song of Litigation Funding*, 9 MICH. BUS. & 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.”).

335. For a discussion of the appropriateness of a ceiling, see *supra* note 309.

336. *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992); cf. *id.* at 565 (arguing that contingency enhancements, if adopted, could not “be restricted to fewer than all contingent-fee cases”); *Pennsylvania v. Del. 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.”).

337. See *supra* Section II.C; see also Hylton, *supra* note 28, 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).

338. See *supra* Section II.D; see also Fitzpatrick, *supra* note 232, at 834 (describing

This potential approach would thus represent a dramatic improvement over the status quo, but it would still involve some degree of undercompensation. 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.”³³⁹

C. Uniform Risk Multipliers

A uniform multiplier, set in advance and applicable to one or more specified fee-shifting statutes or types of claims, would address many of the concerns expressed by the Supreme Court in *Dague*, including the administrability and judicial economy concerns discussed above in connection with case-specific multipliers.³⁴⁰ A uniform multiplier would be very straightforward to add to the existing lodestar approach,³⁴¹ requiring only that courts multiply the lodestar by a predetermined number.³⁴² Moreover, unlike a multiplier set to the exact inverse of the 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.³⁴³ A uniform multiplier would also avoid arbitrariness in distinctions among cases, and (for those cases commenced after the relevant multiplier value was announced) it would avoid the uncertainty for parties and their counsel that could result from a case-specific approach.³⁴⁴

The Court in *Dague* objected that a uniform multiplier could not effectively “mirror[] market incentives,”³⁴⁵ and, notwithstanding the opinion’s flaws, that particular aspect of the Court’s reasoning has been borne out: the contexts examined

lodestar multipliers in common-fund cases as “fairly parsimonious for the risk that goes into any piece of litigation”).

339. 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).

340. See *supra* Section II.C.

341. 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).

342. Cf. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) (objecting that risk multipliers “would make the setting of fees more complex and arbitrary, hence more unpredictable”).

343. Cf. *id.* 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* Section 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).

344. For further discussion of the value of a uniform multiplier, see Leubsdorf, *supra* note 33, at 501–04; Rowe, *supra* note 28, at 632.

345. *Dague*, 505 U.S. at 564.

in Part III support the proposition that the market value of risk-bearing services generally depends on case-specific factors. A uniform multiplier would still draw on the lessons of the market, however, with regard to the difficulty and expense associated with evaluating the risk initially presented by a particular case.³⁴⁶

If the concerns associated with case-specific risk multipliers lead to a choice between adopting uniform multipliers or providing no compensation for risk at all,³⁴⁷ then uniform multipliers are by far the better option. Because fee-shifting statutes are designed to fill a market *gap*, absolute fidelity to the private market is unwarranted; as the Court in *Dague* put it, “[i]t 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.”³⁴⁸ Instead, as the Seventh Circuit once put it, “the best we can hope for in awarding attorney’s fees is rough justice.”³⁴⁹

Because perfection is unachievable, the real question is how to allocate the costs of imprecision.³⁵⁰ Under the current prohibition on compensation for risk, plaintiffs bear the cost of undercompensation in *all* federal statutory fee-shifting cases, because all cases involve some degree of risk.³⁵¹ By contrast, a uniform risk multiplier would cause defendants to bear the costs of imprecision in some cases (i.e., those with a below-threshold level of risk), but it would cause plaintiffs to bear the costs of imprecision in the others (i.e. those with an above-threshold level of risk). Making this choice so as not to allocate all of the costs to the successful plaintiff—“the chosen instrument of Congress to vindicate a policy that Congress considered of the highest

346. See *supra* Section III.E (discussing the costly and time-consuming due diligence conducted by TPLF providers).

347. Cf. Rowe, *supra* note 28, at 633–34 (objecting to using “criticisms of *one way* of handling contingency enhancements as grounds for not allowing them *at all*”) (emphasis in original).

348. *Dague*, 505 U.S. at 566–67.

349. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 637 (7th Cir. 2011) (citing *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 748 (7th Cir. 2011)).

350. 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”).

351. *Dague*, 505 U.S. at 563; see also *supra* Section I.B.

priority”³⁵²—seems like the far better option.³⁵³ From a cost-allocation standpoint, uniform multipliers would thus be superior to a prohibition on compensation for risk.

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.”³⁵⁴ 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,³⁵⁵ 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 2016,³⁵⁶ suggesting that this approach would result in a high uniform multiplier value for that type of claim.

If courts want to ensure 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,³⁵⁷ 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

352. *Christiansburg Garment Co. v. Equal Emp’t Opportunity Comm’n*, 434 U.S. 412, 418 (1978) (citations and internal quotation marks omitted).

353. 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, *supra* note 28, at 328–29.

354. Leubsdorf, *supra* note 33, at 474–75.

355. 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).

356. *Id.* at 1426.

357. See *supra* Section IV.B.4.

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, private-market contingent percentage fees, class action common-fund awards, alternative fee arrangements, and third-party litigation funding—courts and markets regularly provide compensation for risk-bearing services associated with plaintiff-side litigation.³⁵⁸ It is past time for courts to provide that compensation under federal fee-shifting statutes as well. This Article has set forth some options for doing so while attending to potential concerns about overpayment, perverse incentives, and judicial economy.³⁵⁹ Those concerns need not (and should not) result in the denial of compensation for risk altogether.³⁶⁰

358. *See supra* Part III.

359. *See supra* Part IV.

360. *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”).