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# Comment

## A UNIFORM FEE-SETTING SYSTEM FOR CALCULATING COURT-AWARDED ATTORNEYS' FEES: COMBINING *EX ANTE* RATES WITH A MULTIFACTOR LODESTAR METHOD AND A PERFORMANCE-BASED MATHEMATICAL MODEL

### I. INTRODUCTION

The absence of a uniform fee-setting system for calculating reasonable attorneys' fees presents courts with a number of challenging problems.<sup>1</sup> Such difficulties range from preventing windfall fee awards<sup>2</sup> that detract from plaintiffs' recovery amounts in common fund cases<sup>3</sup> to ensuring that attorneys are not undercompensated for

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1. See, e.g., COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, reprinted in 108 F.R.D. 237, 242–46 (1985) [hereinafter TASK FORCE REPORT] (discussing the varying approaches courts have taken to calculate attorneys' fees, and noting the inherent problems with each method); William R. Mureiko, Note, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L.J. 438, 438–40 (explaining that the complete lack of consensus as to the calculation of reasonable attorneys' fees has created much confusion among courts and litigants); Peter-Christian Olivo, Comment, *No More Times Tables: Risk Multipliers in Attorneys' Fee Awards After In Re Bolar Pharmaceutical Co.*, 77 MINN. L. REV. 893, 898–902 (1993) (reviewing various fee-calculation methodologies, and observing that courts have nevertheless failed to reach a consensus on the appropriate method).

2. Windfall fee awards occur when attorneys receive many millions of dollars as compensation for their involvement in a single case, thus diminishing the money intended to compensate the plaintiffs for their injuries. See Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 482 & n.10 (1997) (noting criticism “that lawyers were collecting fees disproportionate to their efforts in the case and taking money that properly belonged to the class members”).

3. See, e.g., Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 466 & n.17 (2006) [hereinafter *Report on Contingent Fees*] (stating that the most frequently lodged complaint against common fund fee awards is that “lawyers receive too much of the funds set aside to compensate victims”); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 423–24 (1993) (noting that scholars have criticized attorneys for charging excessive fees in common fund cases); see also Kendra S. Langlois, Note, *Putting the Plaintiff Class' Needs in the Lead: Reforming Class Action Litigation by Extending the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 44 WM. & MARY L. REV. 855, 855–57 (2002) (describing a court-approved class action settlement agreement that awarded each plaintiff \$10, but also required each plaintiff to pay \$100 in attorneys' fees; thus, “[t]he lawsuit . . . cost each class member \$90”).

the time spent on a case governed by a fee-shifting statute.<sup>4</sup> The crux of the confusion surrounding the calculation of court-awarded attorneys' fees lies in the amorphous concept of reasonableness:<sup>5</sup> What are "reasonable" attorneys' fees?<sup>6</sup> With no definitive answer to this question,<sup>7</sup> litigants and attorneys are left to rely on the subjective intuition of the judge rendering the fee award.<sup>8</sup>

The inherent subjectivity in calculating court-awarded fees has resulted in inconsistency, unpredictability, and a waste of judicial resources.<sup>9</sup> Attorneys who represent similarly situated plaintiffs may well receive vastly differing fee awards depending on the particular

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4. See, e.g., *Manor Country Club v. Flaa*, 874 A.2d 1020, 1025, 1028 (Md. 2005) (following a decade-long litigation, the court awarded the plaintiff's attorney \$22,440, less than 10% of the attorney's \$225,438 lodestar amount).

5. See, e.g., Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 295 (1977) (remarking that, in the context of reasonable attorneys' fees, "reasonableness may not be susceptible of mathematical precision, but neither is it devoid of content"); FTC Workshop: Protecting Consumer Interests in Class Actions, *Class Action Attorney Fees: Compensating Lawyers While Protecting Consumers*, 18 GEO. J. LEGAL ETHICS 1243, 1245 (2005) [hereinafter FTC Workshop] (providing Professor Geoffrey Miller's statement that reasonableness is a highly amorphous concept).

6. George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 600 (2000). Merriam Webster's Collegiate Dictionary defines "reasonable" as "being in accordance with reason . . . , not extreme or excessive . . . ; moderate [or] fair." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 974 (10th ed. 1996). However, any court attempting to extract analytical guidance from this definition would surely find that the definition fails to provide a clear framework for calculating a "reasonable" fee amount in a particular case.

7. See Berger, *supra* note 5, at 305 (noting that statutory fee provisions "almost never attempt to define 'reasonable'"); Michael Kao, Comment, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. REV. 825, 828 (2004) (remarking that many of the fee-shifting provisions that provide for an award of attorneys' fees fail to define or elaborate upon how to calculate what is "reasonable"). Similarly, legal scholars and practitioners continue to grapple with the reasonableness of court-awarded attorneys' fees in common fund cases, as evidenced by the recent (Summer 2006) report on attorneys' fees in class actions. E.g., *Report on Contingent Fees*, *supra* note 3.

8. See *Report on Contingent Fees*, *supra* note 3, at 485 (noting that "[t]he court must substitute its judgment and discretion for the judgment of the market").

Economist William Lynk has described the calculation of reasonable attorneys' fees in common fund cases as an "economic anomaly" because the fee is not determined by the parties who are economically interested in the award—the attorney and the client—but rather is left to the determination of an economically disinterested judge. William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. LEGAL STUD. 185, 185 (1994); see also Berger, *supra* note 5, at 282, 284; Matthew T. Giuliani, Note, *Determining the Reasonableness of Attorneys' Fees—The Discoverability of Billing Records*, 64 B.U. L. REV. 241, 241–44 (1984).

9. See Monique Lapointe, Note, *Attorney's Fees in Common Fund Actions*, 59 FORDHAM L. REV. 843, 847–48, 852–53, 863–64 (1991) (discussing the various problems associated with the lodestar and percentage-of-recovery methods).

court or judge.<sup>10</sup> Because reasonableness tends to breed subjectivity, formulating a uniform fee-setting system to objectively calculate a reasonable fee becomes terribly vexing.<sup>11</sup> At the same time, though, the problems arising from the subjectivity of the current fee-calculating process demand the creation of a uniform fee-setting system that brings objectivity and consistency to the process.<sup>12</sup> This Comment endeavors to accomplish this feat.

Specifically, this Comment focuses on the two types of cases that primarily give rise to court-awarded attorneys' fees: statutory fee-shifting cases (i.e., when the burden of paying the attorney's fee is *shifted* to the losing party—"fee-shifting")<sup>13</sup> and common fund cases (i.e., when payment of the attorney's fee is *spread* amongst a group or class of persons whose interests the attorney represents—"fee-spreading").<sup>14</sup> Courts have developed several methods to calculate reasonable fees in both the fee-shifting and common fund contexts. The three predominant methods are the percentage-of-recovery method,<sup>15</sup> the lodestar method,<sup>16</sup> and the pure factor-based

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10. For example, a fee that a judge in the Ninth Circuit finds reasonable in one case may completely differ from that which a judge in the Fourth Circuit finds reasonable in a virtually identical case.

11. In a recent conference addressing the calculation of attorneys' fees in class action lawsuits, Professor Geoffrey Miller remarked that what qualifies as the best methodology for calculating reasonable attorneys' fees "raises a very thorny question of how we decide what ought to be the criteria we would use to determine the appropriate fee. And I don't even think anybody really has come to a satisfactory answer to that." FTC Workshop, *supra* note 5, at 1259. See also *Report on Contingent Fees*, *supra* note 3, at 466 (stating that "it may be impossible in practice to do better than a rough approximation of the 'right' fee").

12. Judge Richard Posner, in *In re Continental Illinois Securities Litigation*, observed that the loss of the adversarial environment in the fee-setting process in common fund cases calls for a new compensation method:

Since the defendants were out of the case by virtue of their settlement . . . they had no incentive to oppose the request for fees . . . . No class member objected either . . . . This put more work on . . . us than in a case where there is an adversary to keep the plaintiff and appellant honest. . . . [J]udges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures.

962 F.2d 566, 573 (7th Cir. 1992).

13. Berger, *supra* note 5, at 303–05.

14. *Id.* at 282.

15. The percentage-of-recovery method calculates attorneys' fees using a variable percentage of the amount recovered from the defendant. *E.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (In re *Gen. Motors Fuel Tank Litig.*), 55 F.3d 768, 819 n.38 (3d Cir. 1995). Some jurisdictions use a benchmark percentage (e.g., 25% of the fund) and then allow courts to adjust the fee based on the particular facts of the case. See, e.g., *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989) (noting that 25% is an appropriate benchmark percentage for a fee award).

16. The lodestar method calculates court-awarded attorneys' fees by multiplying the number of hours an attorney reasonably expended on the litigation by a reasonable hourly

method.<sup>17</sup> Recently, a fourth methodology, known as the lodestar cross-check,<sup>18</sup> has started to gain popularity.<sup>19</sup> Regardless of the method used by courts, however, the entire court-awarded fee-setting process occurs at the close of the case.<sup>20</sup>

There has been extensive debate over which fee-calculation methodology is most appropriate for courts to use in particular types of cases. Some courts require that the lodestar method be used for all cases (fee-shifting and common fund), while a majority of courts permit the use of two methods—the lodestar method for calculating fees awarded under fee-shifting statutes and the percentage-of-recovery method for awards arising from a common fund.<sup>21</sup> A few jurisdictions leave it to the judge's discretion to decide whether to use the lodestar method, the percentage-of-recovery method, the pure factor-based method, or any other method the judge deems appropriate.<sup>22</sup> In short, the only consistent aspect of court-awarded attorneys' fees is the sheer inconsistency of the fee-setting process.<sup>23</sup>

Endeavoring to bring consistency, predictability, and efficiency to attorney-fee jurisprudence, this Comment proposes a uniform fee-setting system for all court-awarded attorneys' fees. The proposed sys-

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compensation rate for the attorney. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983); *In re Gen. Motors Fuel Tank Litig.*, 55 F.3d at 819 n.37.

17. The pure factor-based method, also referred to as the multifactor method, allows courts to determine a reasonable fee for the attorney by assessing a multitude of factors in light of the specific facts of the case. *See, e.g.*, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974) (setting forth twelve factors for courts to consider when calculating fee awards).

18. The lodestar cross-check is a hybrid of the percentage-of-recovery method and the lodestar method. Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. LEGAL ETHICS 1453, 1459–60 (2005).

19. *See generally id.* For a discussion of the mechanics of the lodestar cross-check, see *infra* notes 146–156 and accompanying text.

20. *See, e.g.*, Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 348–50 (1998) (noting that the court calculates counsel fees after the litigation has concluded).

21. *Compare* *Strong v. BellSouth Telecomms. Inc.*, 137 F.3d 844, 850 (5th Cir. 1998) (stating that the Fifth Circuit uses the lodestar method to calculate attorneys' fees in common fund cases) *with* *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (holding that district court judges may use either the lodestar or the percentage-of-recovery method to calculate attorneys' fees in common fund cases). For a discussion of the use of the lodestar method for calculating fees pursuant to fee-shifting statutes, see *infra* Part II.C.1.

22. *See, e.g.*, *Manor Country Club v. Flaa*, 874 A.2d 1020, 1022, 1034–35 (Md. 2005) (affording judges sufficient discretion to calculate attorneys' fees by considering a myriad of factors set forth in a county fee-shifting statute rather than using the lodestar method).

23. *Berger, supra* note 5, at 292 (stating that "[t]he only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency").

tem involves two steps. The first step requires courts to set an hourly compensation rate for the fee-seeking attorney at the outset of a case.<sup>24</sup> The second step requires courts to adopt appropriate fee-calculation methodologies for use at the end of the litigation.<sup>25</sup> Because the adversarial environment during the fee-setting process in fee-shifting cases differs greatly from that in common fund cases,<sup>26</sup> this Comment proposes the adoption of two fee-calculation methodologies. Specifically, it advocates for the use of a multifactor lodestar method in fee-shifting cases, and for the use of a performance-based mathematical model in common fund cases.<sup>27</sup>

The Background section of this Comment provides an historical overview of the evolution of court-awarded attorneys' fees, with a particular focus on the three predominant fee-calculation methodologies employed by courts to award attorneys' fees—the percentage-of-recovery method, the lodestar method, and the pure factor-based method.<sup>28</sup> It then highlights the problems arising from the use of these methodologies and outlines a number of solutions that have been proposed for these problems. The Background concludes by introducing the recently developed lodestar cross-check.<sup>29</sup>

The Analysis section of this Comment begins by developing a framework through which one could assess the reasonableness of court-awarded attorneys' fees—a “reasonableness continuum.”<sup>30</sup> The Analysis then outlines the process by which fee-seeking attorneys' hourly compensation rates should be set *ex ante* in fee-shifting cases and in common fund cases, respectively.<sup>31</sup> Next, it recommends the adoption of two fee-calculation methodologies and describes in detail the elements and logistics of each.<sup>32</sup> Finally, the Analysis assesses the potential strengths and criticisms of the unique performance-based

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24. See *infra* Part III.B.

25. See *infra* Part III.C.

26. Judge Posner has commented on the distinctions between fee-shifting and common fund cases, namely, the dissimilar adversarial postures between the litigants and the different designation of who bears liability for paying the fee award. See *supra* note 12; see also TASK FORCE REPORT, *supra* note 1, at 251, 255. These distinctions indicate that courts should adopt two fee-calculation methodologies: one for fee-shifting cases and another for common fund cases.

27. See *infra* Part III.C.

28. See *infra* Part II.A.2.

29. See *infra* Part II.B–C.

30. See *infra* Part III.A.

31. See *infra* Part III.B.

32. See *infra* Part III.C.

mathematical model developed in this Comment for use in common fund cases.<sup>33</sup>

## II. BACKGROUND

### A. *The Evolution of Court-Awarded Attorneys' Fees*

#### 1. *The American Rule*

In the late 1700s, American courts began deviating from the English Rule, under which the loser in a litigation was required to pay the winner's legal fees.<sup>34</sup> In its place, courts established the American Rule,<sup>35</sup> whereby each party pays its own legal fees, regardless of who wins in the litigation.<sup>36</sup> Although the American Rule was widely accepted and applied by courts, exceptions to the American Rule arose at the turn of the twentieth century.<sup>37</sup> Among those exceptions were the common fund doctrine and statutory fee-shifting provisions.<sup>38</sup>

The common fund doctrine, first articulated by the Supreme Court of the United States in *Trustees v. Greenough*,<sup>39</sup> permits courts to extract the attorney's fee from the recovery fund awarded to a class of prevailing litigants.<sup>40</sup> This equitable doctrine, which is "derive[d]

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33. See *infra* Part III.C.2.c.

34. Robin Stanley, Note, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney's Fees!*, 36 AKRON L. REV. 363, 365–67 (2003); Michael David Strasavich, Comment, *Court-Ordered Attorney's Fees in Contract Actions: What Is Reasonable?*, 19 J. LEGAL PROF. 301, 301 (1995).

35. Stanley, *supra* note 34, at 366. For an extensive history of the American Rule, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

36. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (recognizing that, absent legislation to the contrary, attorneys' fees are not recoverable from the opposing party); see also Stanley, *supra* note 34, at 366–67.

37. Stanley, *supra* note 34, at 367.

38. TASK FORCE REPORT, *supra* note 1, at 241–42. Other exceptions to the American Rule also exist, such as exceptions relating to enforceable contractual arrangements and bad faith. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."); *F. D. Rich Co., v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (stating that a court may award attorneys' fees to a party when the opposing party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"); see also Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1864–65 (1998) (discussing bad faith and the common fund theory as exceptions to the American Rule).

39. 105 U.S. 527 (1881).

40. *Id.* at 528. In essence, the common fund doctrine holds that attorneys—whose efforts through litigation create, protect, and preserve a fund for a class of persons—are entitled to a reasonable fee from the fund. See *id.* at 532 (explaining that the fairest way to compensate counsel is through the fund itself). For a detailed discussion of the origins of

from the common-law concept that a trustee who is under a duty to act for others is entitled to be reimbursed from that fund for expenses incurred in administering the trust,<sup>41</sup> is premised on preventing unjust enrichment. Specifically, it prevents absent class members who stand to benefit from the recovery fund from being unjustly enriched by refusing to share equally in the financial burden of compensating the attorney.<sup>42</sup>

Under the other significant exception to the American Rule—statutory fee-shifting provisions—courts are given the discretion to shift the burden of compensating the prevailing party’s attorney to the losing party.<sup>43</sup> Fee-shifting statutes aim to ensure that people of all economic backgrounds, who otherwise may lack the means to obtain competent counsel, have the ability to access and utilize the judicial system to enforce specific substantive rights deemed worthy of special protection.<sup>44</sup>

## 2. *The History of Calculating Reasonable Attorneys’ Fees*

Until the middle of the 1970s, courts awarding attorneys’ fees, under either the common fund doctrine or by statutory mandate, routinely did so without any explanation as to how the fee amount was determined.<sup>45</sup> In Samuel Berger’s seminal piece, *Court Awarded Attorneys’ Fees: What is “Reasonable”?*, Berger remarked that, of the decisions reported in volumes 384–94 of the *Federal Supplement* (1974–1975), thirteen of the twenty-eight reported cases that awarded attorneys’ fees contained absolutely no explanation as to how those fees were calculated.<sup>46</sup>

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the common fund doctrine, see John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1601–12 (1974).

41. TASK FORCE REPORT, *supra* note 1, at 250.

42. *E.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (stating that the overriding principle of the common fund doctrine holds that “persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense”); Martha Pacold, Comment, *Attorneys’ Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007, 1014–15 (2001) (same).

43. *E.g.*, Pacold, *supra* note 42, at 1010–11 (discussing fee-shifting statutes as an exception to the American Rule).

44. *City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (Blackmun, J., dissenting) (stating that the rationale for fee-shifting provisions is “to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel” even though the individual may lack the financial means to pay for a lawyer’s services); Kao, *supra* note 7, at 826–27.

45. Berger, *supra* note 5, at 284; *see, e.g.*, *Canterbury v. Dick*, 385 F. Supp. 1004, 1009 (S.D. Tex. 1973) (stating, without explanation, that “\$2,750.00 is a fair and reasonable attorney’s fee for legal services rendered to and for Plaintiffs by their counsel in this suit”).

46. *See* Berger, *supra* note 5, at 284.

Recognizing the difficulty, if not impossibility, of reviewing a fee award when no articulated explanation for the particular fee is provided, the federal circuit courts started endorsing certain fee-calculation methodologies aimed at guiding the process of awarding attorneys' fees. The three primary methods that emerged were the percentage-of-recovery method, the lodestar method, and the pure factor-based method.

*a. The Percentage-of-Recovery Method*

The first method developed by courts to guide the calculation of court-awarded attorneys' fees was the percentage-of-recovery method.<sup>47</sup> This method calculates the attorney's fee award based on "a variable percentage of the amount recovered" by the attorney on behalf of the plaintiffs.<sup>48</sup> Judges maintain complete discretion in selecting the appropriate percentage owed to the attorneys, and therefore singly determine the size of the attorney's fee.<sup>49</sup> In determining what percentage of the recovery to award an attorney, judges rely on factors such as the size of the monetary recovery and the amount of benefit conferred on the plaintiffs.<sup>50</sup>

Over time, the arbitrary and subjective nature of selecting an appropriate percentage caused fee awards to vary considerably from case to case, even where the legal claims being litigated were virtually identical.<sup>51</sup> Often the chosen percentage led to disproportionately large fee awards when compared to the actual time expended on the case by the attorneys, which, in turn, resulted in windfall fee awards for

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47. The percentage-of-recovery method was first used in the 1880s. *E.g.*, *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885); *see also* Reagan W. Silber & Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 *REV. LITIG.* 525, 527–28 (1998) (noting that "fee awards based upon a percentage of a common fund date back to the nineteenth century").

48. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 n.38 (3d Cir. 1995).

49. *TASK FORCE REPORT*, *supra* note 1, at 242; *see also* Richard L. Marcus, *Slouching Toward Discretion*, 78 *NOTRE DAME L. REV.* 1561, 1599–1600 (2003) (discussing the considerable discretion that judges maintain during the fee-setting process, and noting that, in the 1970s, courts approved percentage fees ranging from 2.5% to 49% (citing Dawson, *supra* note 40, at 876)).

50. *TASK FORCE REPORT*, *supra* note 1, at 242; *see* THOMAS E. WILLGING ET AL., *FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 69–70 & n.250* (1996) ("A basic premise of the percentage of recovery method is that a common fund is itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded." (internal quotation marks omitted)).

51. *See* Berger, *supra* note 5, at 317 (discussing the random nature of "percentage picking").

attorneys.<sup>52</sup> The early 1970s witnessed an outcry against such systematic windfall fee awards, and pressure to shift away from the percentage-of-recovery method began to mount.<sup>53</sup>

*b. The Lodestar Method*

In *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*,<sup>54</sup> the Third Circuit rejected the percentage-of-recovery method and, instead, formulated the lodestar method for calculating court-awarded attorneys' fees. This new method sought to simplify and objectify the fee-setting process by establishing an amount—the lodestar amount—to serve as a guiding ideal for the ultimate fee calculation.<sup>55</sup> To arrive at this lodestar amount, courts first multiply the number of hours the attorney reasonably expended on the litigation by a reasonable hourly rate of compensation for that attorney.<sup>56</sup> This calculation produces the time-rate lodestar. The *Lindy I* court posited that the time-rate lodestar generates a fair fee that could subsequently be adjusted upward or downward by the court depending upon the contingent nature of the case and the quality of the attorney's work.<sup>57</sup> This approach, along with its adjustments, became known as the lodestar method.

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52. See ALBA CONTE, ATTORNEY FEE AWARDS § 2.2 (3d ed. 1993); TASK FORCE REPORT, *supra* note 1, at 242; Walker & Horwich, *supra* note 18, at 1468 (noting that “[p]ercentage-based fee awards are about 28% larger than lodestar-based fee awards”).

53. TASK FORCE REPORT, *supra* note 1, at 242.

54. 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976). In *Lindy I*, the Third Circuit vacated the district court's fee award that was based on a percentage of the fund from the settlement, and directed the lower court to recalculate the attorneys' fees using an entirely new formula. *Id.* at 164, 166–70.

55. *Id.* at 167–68.

56. *Id.* Commentators have described *Lindy's* lodestar method as essentially a three-step process. *E.g.*, Murr, *supra* note 6, at 604. First, the court must analyze the attorney's billing records and exclude hours that were not “reasonably expended.” *Id.* at 605. The second step is to determine a reasonable hourly rate of compensation for the particular lawyer requesting the fees. See *id.* (noting that “[w]hat is considered a reasonable rate may depend not only on the attorney's actual fee, it may also be determined by what are presumed to be prevailing rates for other, similarly situated attorneys”). The third step requires the court to adjust upward or downward the time-rate lodestar figure based on the particular facts of the case. *Id.* at 607.

57. *Lindy I*, 487 F.2d at 168. For a further explanation as to what should be considered when determining “the contingent nature of success” and “the quality of an attorney's work,” see *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117–18 (3d Cir. 1976) (*Lindy II*).

*c. The Pure Factor-Based Method*

One year later, in *Johnson v. Georgia Highway Express, Inc.*,<sup>58</sup> the Fifth Circuit offered a different method for calculating reasonable attorneys' fees—the pure factor-based method. In *Johnson*, the court weighed several factors to produce a fee award that would provide a sufficient incentive to attract competent counsel, yet not create a windfall for the attorney.<sup>59</sup> Specifically, the *Johnson* court found that a reasonable fee should reflect a measured consideration of twelve factors: (1) “[t]he time and labor required” for the litigation; (2) “[t]he novelty and difficulty of the questions” presented in the case; (3) “[t]he skill requi[red] to perform the legal service properly”; (4) the avoidance of other work due to the attorney’s acceptance of the case; (5) “[t]he customary fee” charged by attorneys in that community for similar cases; (6) “[w]hether the [attorney’s] fee is fixed or contingent”; (7) the “[t]ime limitations imposed by the client or the circumstances”; (8) “[t]he amount involved and the results obtained”; (9) “[t]he experience, reputation, and ability of the attorneys”; (10) “[t]he ‘undesirability’ of the case”; (11) “[t]he nature and length of the [attorney’s] professional relationship with the client”; and (12) fee “[a]wards in similar cases.”<sup>60</sup> These factors have since become known as the *Johnson* factors.<sup>61</sup>

3. *Circuit Disagreement Over the Appropriate Fee-Calculation Methodology*

During the 1980s, courts employed the percentage-of-recovery method, the lodestar method, and the pure factor-based model in different circumstances and to varying degrees.<sup>62</sup> Some courts rejected the lodestar method and the factor-based model, opting instead for the percentage-of-recovery method.<sup>63</sup> Other courts and legal commentators endorsed the *Johnson* factors, criticizing the lodestar

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58. 488 F.2d 714 (5th Cir. 1974).

59. *See id.* at 719–20 (explaining that the guidelines set forth in *Johnson* are intended to ensure adequate compensation but are not meant to make the “prevailing counsel rich”).

60. *Id.* at 717–19.

61. *See, e.g.,* *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266 (D.C. Cir. 1993) (referring to the guidelines from *Johnson* as “the *Johnson* factors”).

62. *See* Justin Lamb, Comment, *The Lodestar Process of Determining Attorney’s Fees: Guiding Light or Black Hole?*, 27 J. LEGAL PROF. 203, 212–13 (2003) (noting that after the Supreme Court’s 1984 decision in *Blum v. Stenson*, 465 U.S. 886 (1984), courts essentially split into three groups with regard to the proper fee-calculation methodology).

63. *Id.* at 212.

method as overly mathematical and rigid.<sup>64</sup> Proponents of the lodestar method criticized the *Johnson* factors as injecting too much subjectivity into the fee-setting process, and claimed that the factor-based model failed to provide an analytical framework or “guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all.”<sup>65</sup> As the D.C. Circuit observed in *Copeland v. Marshall*:<sup>66</sup> “Simply to articulate those twelve factors . . . does not itself conjure up a reasonable dollar figure in the mind of a district court judge. A formula is necessary to translate the relevant factors into terms of dollars and cents.”<sup>67</sup> As had been predicted, the *Johnson* factors led to arbitrary and unsubstantiated pronouncements of fees.<sup>68</sup>

#### 4. *The Supreme Court Adopts the Lodestar Method*

Recognizing the disagreement among the federal circuits as to the appropriate fee-calculation methodology, the Supreme Court, in *Hensley v. Eckerhart*,<sup>69</sup> articulated a fee-calculation methodology that combined the lodestar method and the *Johnson* factors.<sup>70</sup> Specifically, the Court found that multiplying hours reasonably expended by a reasonable hourly rate for the attorney would provide courts with an objective starting point from which they could more accurately assess the value of the attorney’s services.<sup>71</sup> Rather than ending the fee inquiry with the hours-multiplied-by-rate computation, the Court proceeded to explain that there are other factors to which courts could look to later adjust the time-rate lodestar upward or downward.<sup>72</sup> In a related

64. See TASK FORCE REPORT, *supra* note 1, at 247 (reporting one of the main criticisms of the lodestar method—it “creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law”).

65. Berger, *supra* note 5, at 286–87.

66. 641 F.2d 880 (D.C. Cir. 1980) (en banc).

67. *Id.* at 890.

68. See, e.g., *Gay v. Bd. of Trs.*, 608 F.2d 127, 128 (5th Cir. 1979) (finding that the district court erred by merely mentioning the *Johnson* factors without further explanation); *Davis v. Fletcher*, 598 F.2d 469, 470–71 (5th Cir. 1979) (per curiam) (remanding a challenge to an attorneys’ fee award because the district court provided no written explanation for the award).

69. 461 U.S. 424 (1983).

70. *Id.* at 433–34 & n.9. Interestingly, the issue before the *Hensley* Court did not directly concern fee-calculation methodologies; rather, the specific issue was whether plaintiffs who partially prevail on their claims may recover attorneys’ fees for hours expended on the unsuccessful claims. *Id.* at 426. Ultimately, the Court held that partially prevailing plaintiffs may not recover a fee award for legal services dedicated to any unsuccessful claims. *Id.* at 440.

71. *Id.* at 433–34.

72. *Id.*

footnote, the Court explicitly stated that courts may consider the *Johnson* factors when adjusting the fee; however, the Court was careful to note that “many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.”<sup>73</sup> In the years immediately following the *Hensley* decision, federal courts began using *Hensley*’s articulated lodestar method to calculate attorneys’ fees in both common fund cases and statutory fee-shifting cases.<sup>74</sup>

*B. The Difficulties Encountered with Applying the Lodestar Method to Common Fund Cases*

Shortly after the lodestar method articulated in *Hensley* took root, courts and commentators began to realize that the lodestar method was ill-suited for common fund cases.<sup>75</sup> In response, the Third Circuit assembled a group of judges and attorneys (the Third Circuit Task Force) to evaluate the continued viability of the lodestar method.<sup>76</sup> In late 1985, the Third Circuit Task Force issued its report (Task Force Report).

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73. *Id.* at 434 n.9. The *Hensley* Court also announced that fee-seeking attorneys must submit to the court evidence substantiating the hours worked and compensation rates claimed. *Id.* at 433. The Court further explained that district courts should exclude excessive, redundant, and unnecessary hours from the time-rate lodestar calculation, reasoning that “[h]ours that are not properly billed to one’s *client* also are not properly billed to one’s *adversary* pursuant to statutory authority.” *Id.* at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc)).

74. *See, e.g.*, *Pennsylvania v. Del. Valley Citizens’ Council for Clear Air*, 478 U.S. 546, 563–64 (1986) (utilizing the Supreme Court’s adoption of a “hybrid approach that shared elements of both *Johnson* and the lodestar method of calculation” to calculate fees pursuant to a fee-shifting statute); *Lynch v. City of Milwaukee*, 747 F.2d 423, 426–27 (7th Cir. 1984) (endorsing the lodestar method used by the Supreme Court in *Hensley* to calculate court-awarded attorneys’ fees in common fund cases); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 12–13 (D.C. Cir. 1984) (discussing and applying *Hensley*’s articulated lodestar method to award attorneys’ fees in a case that produced a common fund, yet was governed by a fee-shifting statute), *overruled by Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

75. *See, e.g.*, *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 n.19 (3d Cir. 1984) (noting that courts, without thoughtful analysis, applied the lodestar method to both fee-shifting and common fund cases); Lamb, *supra* note 62, at 211–12 (highlighting a shift in the use of the lodestar method by courts). Many believe that the impetus for the shift in fee-calculation methodology came from the Supreme Court’s famous footnote 16 in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), in which the Court stated: “[u]nlike the calculation of attorney’s fees under the ‘common fund doctrine,’ where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation.” *E.g.*, Lamb, *supra* note 62, at 211–12.

76. TASK FORCE REPORT, *supra* note 1, at 238.

1. *The Deficiencies in the Lodestar Method*

The Task Force Report identified and discussed several criticisms of the lodestar method.<sup>77</sup> With regard to its implications on the judiciary, the Task Force Report noted that the lodestar method wastes judicial resources by requiring judges to review voluminous billing records, creates an unwarranted sense of mathematical precision, remains susceptible to manipulation by judges who would rather set fees using percentages of the amounts recovered by the plaintiffs, and fails to provide courts with sufficient flexibility to reward or deter lawyers in order to foster desirable objectives like early settlement.<sup>78</sup> The Task Force Report also discussed the negative effect the lodestar method has on attorneys, namely that it contains overly subjective elements that produce inconsistent and unpredictable fee awards, encourages attorneys to inflate their hours and rates, and establishes a disincentive to settle cases early by encouraging attorneys to maximize the number of hours included in their lodestar fee petition.<sup>79</sup> Finally, the Task Force Report discussed the negative implications the lodestar method has on the litigants: the lodestar method disadvantages the public interest bar by systematically awarding higher fees in securities and antitrust cases than in cases under statutes that “promot[e] non-monetary social objectives.”<sup>80</sup>

2. *The Recognition of the Difference Between Common Fund and Fee-Shifting Cases and the Third Circuit Task Force’s Recommendations for Future Court-Awarded Attorneys’ Fees*

The Third Circuit Task Force recognized that the level of judicial oversight necessary during the fee-setting process in common fund cases so differs from that in the statutory fee-shifting context that it is inappropriate to use the same fee-calculation methodology for both types of cases.<sup>81</sup> This, according to the Task Force, is largely because the financial interests of the party bearing the economic burden for the attorneys’ fee award (i.e., the plaintiffs in a common fund case and the defendant in a fee-shifting case) are represented in fee-

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77. *Id.* at 246–49.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 251. The Task Force Report noted that in common fund cases, unlike in fee-shifting cases, “the plaintiffs’ attorney’s role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients’ benefit.” *Id.* at 255. Thus, the judge is left to serve as the fiduciary for the plaintiffs. *Id.*

shifting cases, but unrepresented in common fund cases.<sup>82</sup> Thus, in common fund cases, there must be a check in place to ensure the accuracy and reasonableness of the fee the attorney is requesting.

More specifically, the Task Force Report emphasized that in common fund cases the attorney's fee is extracted from the fund paid by the defendant, thus extinguishing the defendant's liability for the attorney's fee upon its payment of the judgment or settlement fund.<sup>83</sup> As such, common fund cases provoke a financial conflict of interest between the plaintiffs' attorney, who will seek the highest fee award from the fund, and the plaintiffs, who will want to preserve the fund to maximize the monetary recompense available for their injuries.<sup>84</sup> With no one to represent the plaintiffs' interest at the time the fees are set, the Third Circuit Task Force recognized that judges must act as fiduciaries for the beneficiaries of the fund (the plaintiffs) who will be paying the fee.<sup>85</sup>

Conversely, in the fee-shifting context, the Task Force recognized that the need for significant judicial involvement is obviated by the fact that the extent of the defendant's liability for paying the plaintiff's attorney's fees is tied directly to the size of the fee award.<sup>86</sup> Because the defendant bears the economic burden of paying the plaintiff's attorney's fees, the defendant is an active participant in the attorneys' fees calculation—vigorously objecting to hours included in the fee petition that the defendant deems unreasonably expended—thereby sustaining the adversarial posture throughout the fee-setting process.<sup>87</sup> As a result, the judge need only rule on the requested lode-

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82. *Id.* at 251, 255; *see also* Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n, 3 F.3d 1568, 1573 (D.C. Cir. 1993) (stating that judicial oversight is especially desirable in common fund cases because the class members and their attorneys may have different interests); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (noting that there is typically no one present to argue against the plaintiffs' recovery being reduced due to large attorneys' fees awards in common fund cases: "class members with small individual stakes in the outcome will not file objections, and the defendant who contributed to the fund will usually have scant interest in how the fund is divided between the plaintiffs and class counsel").

83. TASK FORCE REPORT, *supra* note 1, at 251; *see also* Lapointe, *supra* note 9, at 866.

84. *See* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("[T]he conflict between a class and its attorney may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery . . .").

85. TASK FORCE REPORT, *supra* note 1, at 251, 255; *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 187 (3d Cir. 2005) (emphasizing that courts must carefully examine fee petitions in common fund cases because their role is similar to a fiduciary for the plaintiffs).

86. TASK FORCE REPORT, *supra* note 1, at 251; Lapointe, *supra* note 9, at 865–66.

87. Lapointe, *supra* note 9, at 865–66.

star amount set forth in the competing fee petitions submitted by the adversaries.<sup>88</sup>

Given the differing requisite levels of judicial involvement, the Task Force Report concluded with two primary recommendations for future court-awarded attorneys' fees. First, in common fund cases, courts should set percentage-based fee arrangements at the earliest possible stage of the litigation.<sup>89</sup> Second, in cases governed by a fee-shifting statute, the attorney's fee award should be calculated using the basic lodestar approach, given the assurance of the defendant's aggressive role in ensuring that the fee set is a fair amount.<sup>90</sup>

### C. *The Current Landscape in Court-Awarded Attorneys' Fees throughout the United States*

#### 1. *Fee-Shifting Cases*

Both federal and state courts overwhelmingly use the lodestar method to calculate attorneys' fees in fee-shifting cases.<sup>91</sup> Significant disagreement exists, however, as to how and when the *Johnson* factors should be applied to this calculation.<sup>92</sup> Federal courts now apply the *Johnson* factors when setting an attorney's hourly compensation rate and when determining which hours were reasonably expended.<sup>93</sup> This process of incorporating the *Johnson* factors into the time-rate lodestar calculation has been dubbed the "strict" lodestar method.<sup>94</sup> State courts, in contrast, utilize the *Johnson* factors to adjust the time-rate calculation upward or downward based on the facts of the particular case.<sup>95</sup> This approach has been referred to as the "multifactor" lodestar method.<sup>96</sup> Because federal courts employ the strict lodestar method and state courts predominantly use the multifactor lodestar method, a single, uniform version of the lodestar method has failed to emerge.

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88. TASK FORCE REPORT, *supra* note 1, at 251.

89. *Id.* at 255.

90. *Id.* at 256.

91. Kao, *supra* note 7, at 828–29, 831–32.

92. *Id.* at 831–32.

93. *Id.* at 832–33.

94. *Id.* at 832.

95. *Id.* at 834.

96. *Id.* at 832.

a. *Federal Courts*

All federal courts use the strict lodestar method to calculate reasonable attorneys' fees under fee-shifting statutes.<sup>97</sup> Only one year after the Supreme Court first articulated its understanding of the lodestar method in *Hensley*, the Court in *Blum v. Stenson*<sup>98</sup> expanded its interpretation of the lodestar method by subsuming additional factors into the lodestar calculation.<sup>99</sup> Two years later, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,<sup>100</sup> the Supreme Court expressly endorsed the "strict" lodestar method, stating that most, if not all, of the *Johnson* factors are considered in arriving at the time-rate lodestar amount.<sup>101</sup> Following the Supreme Court's lead, most federal courts have found that adjusting the lodestar amount using the *Johnson* factors, whether through the use of a "multiplier" or not,<sup>102</sup> is unnecessary.<sup>103</sup> Consequently, under the strict lodestar method, "there is very little room for adjustment" after the time-rate lodestar amount has been calculated.<sup>104</sup>

The Supreme Court most recently applied the strict lodestar method in *City of Burlington v. Dague*.<sup>105</sup> In *Dague*, the Court held that any enhancement to the time-rate lodestar to account for the contingent risk of a case is impermissible.<sup>106</sup> Specifically, the *Dague* Court stated that the attorney's contingent risk in a particular case is the product of "the legal and factual merits of the claim" and "the difficulty of establishing those merits."<sup>107</sup> Because the difficulty in establishing the legal and factual merits is likely reflected in either the

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97. See, e.g., *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Blum v. Stenson*, 465 U.S. 886, 888 (1984); Walker & Horwich, *supra* note 18, at 1453; Kao, *supra* note 7, at 833. 98. 465 U.S. 886 (1984).

99. *Id.* at 898-99. In *Blum*, the Court explained that factors like the "novelty and complexity" of the legal issues are presumably reflected in the number of billable hours the attorney submits in her fee petition, while factors like the "quality of representation" and the experience and reputation of the attorney are generally reflected in the attorney's hourly rate of compensation. *Id.* The *Blum* Court also stated that "'results obtained' generally [is] subsumed within other factors used to calculate a reasonable fee . . . [and] normally should not provide an independent basis for increasing the fee award." *Id.* at 900.

100. 478 U.S. 546 (1986).

101. *Id.* at 566 (finding that the time-rate calculation of the lodestar amount usually provides full and reasonable compensation for attorneys in fee-shifting cases).

102. A multiplier has been defined as "a factor applied to the lodestar amount to arrive at the final fee award." Kao, *supra* note 7, at 829 n.27.

103. *Id.* at 834.

104. *Id.* (internal quotation marks omitted).

105. 505 U.S. 557 (1992).

106. *Id.* at 567.

107. *Id.* at 562.

higher number of hours the attorney expends or the higher hourly compensation rate charged by an attorney who has the experience and skill to overcome such difficulty, enhancing the lodestar amount to reflect the contingent risk of the case would result in double counting.<sup>108</sup> Therefore, today, federal courts end their calculation after computing the time-rate lodestar amount, only applying a multiplier or enhancement to the time-rate lodestar in “exceptional” and “rare” cases.<sup>109</sup>

*b. State Courts*

In contrast to the strict lodestar method used in federal courts, most state courts follow the multifactor lodestar method to calculate reasonable attorneys’ fees in fee-shifting cases.<sup>110</sup> Under the multifactor version of the lodestar method, a court determines the initial lodestar amount, excepting duplicative, remedial, and other such hours from its calculation, and then analyzes the specific facts and circumstances of the case to determine whether an upward or downward adjustment to the unenhanced time-rate lodestar<sup>111</sup> amount is warranted.<sup>112</sup> The majority of state courts then use the *Johnson* factors to adjust the product of the time-rate lodestar calculation.<sup>113</sup> Some states, such as Pennsylvania,<sup>114</sup> Washington,<sup>115</sup> California,<sup>116</sup> Connecti-

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108. *Id.* at 562–63.

109. *Blum v. Stenson*, 465 U.S. 886, 901 (1984); *Kao*, *supra* note 7, at 829, 833.

110. *See Kao*, *supra* note 7, at 831–33. For example, in *In re South Dakota Microsoft Antitrust Litigation*, the Supreme Court of South Dakota stated that when South Dakota courts award attorneys’ fees pursuant to fee-shifting statutes, those courts should first apply the lodestar method and then use the eight factors set forth in *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994) to adjust the time-rate lodestar amount. 707 N.W.2d 85, 98–99 (S.D. 2005).

Some states, however, such as Kentucky, Iowa, and Ohio, have embraced the strict lodestar method used by the federal courts. *See, e.g.*, *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 826 (Ky. 1992) (noting that the fee-calculation methodology announced in *Hensley* is controlling, but that “contingency enhancements” are inappropriate in fee-shifting cases); *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897–98 (Iowa 1996) (adopting the federal courts’ analytical framework for calculating reasonable attorneys’ fees pursuant to fee-shifting statutes); *Freeman v. Crown City Mining, Inc.*, 630 N.E.2d 19, 27 (Ohio Ct. App. 1993) (citing *Hensley* and *Blum* in rejecting an enhancement of the lodestar amount).

111. To be clear, the unenhanced time-rate lodestar calculation involves multiplying the attorney’s hourly compensation rate by the number of hours reasonably expended by the attorney; the *Johnson* factors are not considered during this calculation. *See Kao*, *supra* note 7, at 835.

112. *Id.* at 834–35.

113. *Id.* at 835.

114. *E.g.*, *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. Ct. 2005) (upholding a trial court’s decision to apply a 1.5 contingency multiplier to the lodestar amount).

cut,<sup>117</sup> Texas,<sup>118</sup> Alabama,<sup>119</sup> Florida,<sup>120</sup> Hawaii,<sup>121</sup> and New Jersey,<sup>122</sup> use a multiplier to adjust the time-rate calculation. This multiplier version of the multifactor lodestar method is not, however, uniformly performed by all states that follow the multifactor lodestar approach.<sup>123</sup>

A select number of state courts reject the lodestar method altogether, instead permitting judges to use their discretion to select an appropriate means to calculate a reasonable attorneys' fee.<sup>124</sup> The recent decision by the Court of Appeals of Maryland in *Manor Country Club v. Flaa*<sup>125</sup> illustrates what has happened when state court judges maintain discretion to calculate reasonable attorneys' fees, absent a standard methodology. In *Flaa*, which involved a fee-shifting statute that enumerated specific factors for courts to consider when calculating reasonable attorneys' fees,<sup>126</sup> the court held that when attorneys' fees are permitted by statute, the lodestar method is generally the correct approach for calculating these fees *except* where the fee-shifting

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115. *E.g.*, *Banuelos v. TSA Wash., Inc.*, No. 24563-2-III, 2006 Wash. App. LEXIS 1818, at \*17-18 (Wash. Ct. App. Aug. 17, 2006) (affirming the trial court's application of a 1.5 multiplier).

116. *E.g.*, *Ketchum v. Moses*, 17 P.3d 735, 741-42, 744 (Cal. 2001) (approving the use of a multiplier).

117. *E.g.*, *Gray v. Foundation Health Sys., Inc.*, No. X06CV990158549S, 2004 Conn. Super. LEXIS 989, at \*13 (Conn. Super. Ct. Apr. 21, 2004) (permitting a multiplier of 1.7).

118. *E.g.*, *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 413 (Tex. App. 2002) (finding that the trial court did not abuse its discretion by applying a multiplier).

119. *E.g.*, *City of Birmingham v. Horn*, 810 So. 2d 667, 684-85 (Ala. 2001) (reducing the trial court's application of a multiplier of 2 to a multiplier of 1.5).

120. *E.g.*, *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 834-35 (Fla. 1990) (stating that courts are permitted, but not required, to use a multiplier). *But see* *Baratta v. Valley Oak Homeowners' Ass'n at the Vineyards, Inc.*, 928 So. 2d 495, 497 (Fla. Dist. Ct. App. 2006) (stating that the Florida Supreme Court, in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1146 (Fla. 1985), adopted the strict lodestar method for calculating attorneys' fees in statutory fee-shifting cases).

121. *E.g.*, *Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 96 (Haw. 2001) (concluding that a multiplier may be applied to the lodestar fee in certain circumstances).

122. *E.g.*, *Rendine v. Pantzer*, 661 A.2d 1202, 1230-31 (N.J. 1995) (approving the use of multipliers in fee-shifting cases).

123. *See, e.g.*, *Tampan, Inc. v. Prop. Tax Appeal Bd.*, 566 N.E.2d 905, 913 (Ill. App. Ct. 1991) (applying dollar value adjustment to the lodestar figure rather than a multiplier); *Simonian v. Town of Hull*, No. 87-5673, 1993 Mass. Super. LEXIS 17, at \*4 (Mass. Super. Ct. Dec. 30, 1993) (same).

124. *See, e.g.*, *Manor Country Club v. Flaa*, 874 A.2d 1020, 1034-35 (Md. 2005) (choosing not to apply the lodestar method because the fee-shifting statute contained criteria for courts to consider in calculating attorneys' fees); *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 548-49 (Nev. 2005) (en banc) (granting Nevada courts the discretion to apply any reasonable and fair method to calculate attorneys' fees).

125. 874 A.2d 1020 (Md. 2005).

126. *See infra* note 189.

statute sets forth specific criteria for courts to consider when calculating the fees.<sup>127</sup> In so holding, the court rejected the lodestar method and awarded the plaintiff's attorney \$22,440, less than 10% of the requested \$225,438 time-rate lodestar amount.<sup>128</sup> Maryland is somewhat unique, however, as most state courts do apply the multifactor version of the lodestar method for all fee-shifting statutes.<sup>129</sup>

## 2. *Common Fund Cases*

In common fund cases, although the majority of courts currently have discretion to choose between the percentage-of-recovery method and the lodestar method,<sup>130</sup> the percentage-of-recovery method is

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127. *Flaa*, 874 A.2d at 1032, 1034–35.

128. *Id.* at 1025, 1028.

129. *See supra* note 110 and accompanying text.

130. As it currently stands, courts in the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits have discretion to use the percentage-of-recovery method or the lodestar method to calculate reasonable attorneys' fees in common fund cases. *See, e.g.*, *United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999) (noting that trial courts enjoy "extremely broad" discretion to apportion shares of the common fund between plaintiffs and their attorneys, and approving the use of the percentage-of-recovery and lodestar methods for calculation of reasonable attorneys' fees); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121–22 (2d Cir. 2005) ("Courts may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method."); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005) (stating that the percentage-of-recovery method has become the dominant method for calculating attorneys' fees in common fund cases, and that the Third Circuit urges trial courts to apply a lodestar cross-check to limit excessive lodestar multipliers); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) (explaining that district judges have the "discretion to choose between the lodestar and percentage-of-fund approaches"); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 247 (8th Cir. 1996) (stating that district courts are "free to utilize either the lodestar or the percentage of the benefit method"); *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002) (reiterating that "district courts have the discretion to calculate attorney's fees by either the lodestar or percentage-of-the-fund approach"); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995) (noting that the Tenth Circuit has applied both the lodestar and percentage-of-recovery methods, but prefers the percentage-of-recovery method for common fund cases).

A smaller number of circuits—the Eleventh Circuit and the D.C. Circuit—mandate the use of the percentage-of-recovery method in common fund cases. *E.g.*, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) ("[A]ttorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991))); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (stating that the D.C. Circuit joins "the Third Circuit Task Force and the Eleventh Circuit . . . in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases").

The Sixth Circuit leaves to the district courts the selection of an appropriate fee-calculation methodology in light of the particular circumstances of the case, stipulating only that the fee award in common fund cases be "reasonable under the circumstances." *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) (quoting *Rawlings v. Prudential Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).

largely favored.<sup>131</sup> Courts seem to prefer the percentage-of-recovery method for four reasons. First, it requires fewer judicial resources to administer, especially in complex litigation.<sup>132</sup> Second, it removes barriers to settlement that arise where the fee-calculation methodology emphasizes “hours worked,” as in the lodestar method.<sup>133</sup> Third, the percentage-of-recovery method better aligns the financial interests of the plaintiffs with their attorneys, thereby avoiding conflicts that might arise under the lodestar method.<sup>134</sup> And fourth, the percentage-of-recovery method “more accurately reflects the economics of litigation practice.”<sup>135</sup>

The percentage-of-recovery method, however, has clear disadvantages in common fund cases. Commentators continually bemoan the subjectivity and arbitrariness of selecting a “reasonable percentage” of the fund.<sup>136</sup> This lack of objectivity has, in turn, continued to pro-

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The only circuit to require the lodestar method in common fund cases is the Fifth Circuit. *E.g.*, *Strong v. BellSouth Telecomms. Inc.*, 137 F.3d 844, 850 (5th Cir. 1998) (stating that the Fifth Circuit uses the lodestar method to calculate attorneys’ fees in common fund cases). Based on a search of recent case law on LexisNexis and Westlaw, the Fourth Circuit does not appear to endorse any particular method.

131. *E.g.*, *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at \*83 (N.D. Tex. Nov. 8, 2005) (concluding that “there is a strong consensus in favor of awarding attorneys’ fees in common fund cases as a percentage of the recovery”); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003) (“A percentage fee approach, as opposed to a lodestar computation, is the preferred method for determining awards of attorneys’ fees in common fund, or class action, cases.”).

132. *E.g.*, *Swedish Hosp. Corp.*, 1 F.3d at 1269–70. In *Goldberger v. Integrated Resources, Inc.*, the Second Circuit observed that “[a]s so often happens with simple nostrums, experience with the lodestar method proved vexing. . . . [T]he primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.” 209 F.3d 43, 48–49 (2d Cir. 2000) (citations omitted).

133. *See, e.g.*, *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting that the lodestar method encourages inefficiency because attorneys have a monetary incentive to bill as many hours as possible, which creates strong disincentives to settlement).

134. *E.g.*, *Bussie v. Allmerica Fin. Corp.*, No. 97-40204-NMG, 1999 U.S. Dist. LEXIS 7793, at \*5 (D. Mass. 1999) (“From a public policy standpoint, the [percentage-of-the-fund] method of calculating fees more appropriately aligns the interests of the class with the interests of class counsel—the larger the value of the settlement, the larger the value of the fee award.” (internal quotation marks omitted)).

135. *Swedish Hosp. Corp.*, 1 F.3d at 1269; *Howes v. Atkins*, 668 F. Supp. 1021, 1025 (E.D. Ky. 1987).

136. *See, e.g.*, *Marcus*, *supra* note 49, at 1599–1600 (commenting that considerable discretion is placed with judges to set percentage-based fees, and noting that this discretion has yielded wide variations of fee awards); *Judith Resnik et al., Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 343–44 (1996) (stating that, although the percentage-of-recovery method is easy to administer, judges maintain complete discretion to select a percentage “whose arbitrariness is cushioned only by reference to other similarly arbitrary decisions”); *Lapointe*, *supra* note 9, at 867–69.

duce windfall fee awards.<sup>137</sup> In jurisdictions that set attorneys' fees in common fund cases using a benchmark percentage, courts have been criticized for ignoring the particular case's circumstances and risks.<sup>138</sup> Concern has also arisen that attorneys may base the level of effort they invest in a case upon the "marginal return" on their investment and, therefore, opt to settle cases too early.<sup>139</sup>

Some federal circuit courts have attempted to alleviate the subjectivity of "percentage picking" by adopting specific factors for courts to consider in selecting a reasonable percentage. For example, when selecting a reasonable percentage, the Second Circuit uses the factors set forth in *Goldberger v. Integrated Resources, Inc.*,<sup>140</sup> and the Third Circuit uses the factors from *Gunter v. Ridgewood Energy Corp.*<sup>141</sup> Nevertheless, despite these efforts, the percentage-of-recovery method remains subject to significant criticism.<sup>142</sup>

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The subjectivity inherent in selecting a reasonable percentage has spurred scholars, judges, and practitioners to address the difficulties in calculating reasonable attorneys' fees in common fund cases and to propose solutions for them. One proposal recommends implementing an "offer of judgment" rule as a means to resolve disputes over the amount of attorneys' fees.<sup>143</sup> Some commentators suggest allowing in-

137. See Lapointe, *supra* note 9, at 863 & n.143 (noting the problem of windfall fee awards inherent in the percentage-of-recovery method).

138. *Report on Contingent Fees, supra* note 3, at 470.

139. *Id.* at 469.

140. 209 F.3d 43 (2d Cir. 2000). The Second Circuit considers the time and labor expended by the attorney, the complexities and risk of the litigation, the quality and adequacy of representation, the size of the requested fee compared to the settlement amount, and any public policy concerns. *Id.* at 50 (citing *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989)).

141. 223 F.3d 190 (3d Cir. 2000). The *Gunter* factors include the amount recovered and the number of plaintiffs who stand to benefit from it, the skill and efficiency of the legal representation, the class members' objections to the settlement terms or the amount of attorneys' fees requested, the duration and complexity of the case, the risk of nonpayment, the amount of time the attorney expended in the litigation, and the fees that have been awarded in similar cases. *Id.* at 195 n.1.

142. See, e.g., *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2072 & n.95 (1995). For a further discussion of the problems created by the percentage-of-recovery method, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 23-25, 59-61 (1991).

143. James C. Hauser & Scott D. Makar, *Litigating the Amount of Attorneys' Fees: A Proposal for Reform*, 73 FLA. B.J. 16, 17-18 (1999) (proposing offer of judgment as a possible solution).

stitutional investors, or the attorneys themselves, to purchase the legal claims from the plaintiffs.<sup>144</sup> Another proposal involves court-run class counsel auctions.<sup>145</sup> A proposal that seems to be gaining widespread support among scholars and courts entails the use of a lodestar cross-check to ensure the percentage of the fund chosen by the court does not give the attorney a windfall fee award at the plaintiffs' expense.<sup>146</sup>

Given the lodestar cross-check's increasing popularity, it warrants brief discussion. To perform the lodestar cross-check, the court, following the litigation, selects a reasonable percentage of the fund from which the initial attorneys' fees amount is to be computed. It then calculates a preliminary percentage-based fee using that percentage.<sup>147</sup> The court next undertakes an "abbreviated" lodestar computation,<sup>148</sup> using the same unenhanced time-rate lodestar calculation as in the multifactor lodestar method, except that the court relies largely on the attorney's sworn statements as to the accuracy and fairness of the hours requested, as opposed to conducting a full-scale investigation into the reasonableness of those hours.<sup>149</sup> Next, the court divides the percentage-based fee by the abbreviated lodestar fee to obtain the implied multiplier.<sup>150</sup> The court then evaluates the reasonableness of this multiplier by comparing it to multipliers that other courts have approved in similar cases.<sup>151</sup> If the implied multiplier is close to previously approved multipliers, the percentage-based fee is reasonable under the lodestar cross-check.<sup>152</sup> Where the implied multiplier does

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144. *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1827, 1845 (2000) (discussing the sale of legal claims).

145. Macey & Miller, *supra* note 142, at 105–16 (discussing the viability of auctioning the role of lead counsel in class action lawsuits); see also Thomas & Hansen, *supra* note 3, at 424 (explaining the significant benefits of the auction approach: "combining the agent and the principal will result in focused ownership of the case and lead to the use of more efficient litigation techniques").

146. Walker & Horwich, *supra* note 18, at 1463 (noting the increased frequency with which courts have been experimenting with the lodestar cross-check).

147. *Id.*

148. *Id.*

149. *Id.* at 1463–64.

150. *Id.* at 1463.

151. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122 (2004) (explaining that after the lodestar estimate is divided into the percentage-based fee, the court compares the implied multiplier to other multipliers in similar cases).

152. See, e.g., *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (reviewing the implied multiplier produced by the lodestar cross-check, and strongly suggesting that, on remand, applying a lodestar multiplier of 3 would be consistent with similar cases).

not resemble other approved multipliers, the court will reevaluate its selection of the reasonable percentage rate.<sup>153</sup>

The lodestar cross-check may best be illustrated through an example. Suppose an attorney brings a lawsuit on behalf of a group of plaintiffs. Four years later, the plaintiffs prevail, receiving a common fund of \$50 million.<sup>154</sup> The court determines that, based on the facts of the case, a reasonable percentage of the fund for the attorney's fee is 20%, making the attorney's fee \$10 million. The attorney provides the court with a fee statement setting forth the total number of hours she reasonably expended on the litigation as well as her average hourly billing rate.<sup>155</sup> Suppose the attorney spent 8,000 hours on the case and the attorney's average hourly rate is \$250. Multiplying 8,000 hours by \$250 produces an abbreviated lodestar amount of \$2 million. The court's percentage-based fee, however, would award the attorney \$10 million. Dividing the percentage-based fee of \$10 million by the abbreviated lodestar fee of \$2 million implies a multiplier of 5. To determine whether the implied multiplier of 5 is reasonable in this particular case, or whether it would create a windfall for the attorney, the court compares the implied multiplier to multipliers approved by courts in similar cases. If courts in similar cases have approved multipliers of 4.2, 3.8, 4.9, and 5.2, for example, the implied multiplier of 5 in this case would fall within the range of approved multipliers. Thus, the court would likely find the percentage-fee award of \$10 million to be reasonable. If, however, courts in similar cases had approved multipliers of 1.7, 2.1, 2.2, and 3.1, the court would likely find the implied multiplier of 5 to be unreasonable, leaving the court to reassess its original determination of a reasonable percentage. In practice, courts applying the lodestar cross-check have generally found multipliers ranging from 1.0 to 4.0 to be reasonable.<sup>156</sup>

To summarize, in fee-shifting cases, federal courts calculate fee awards using the strict lodestar method, while most state courts use

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153. See *id.* (rejecting the district court's application of a lodestar multiplier between 7 and 10, and suggesting that the district court apply a multiplier no greater than 3); see also Walker & Horwich, *supra* note 18, at 1463.

154. It does not matter whether the \$50 million common fund is the product of a settlement or a monetary judgment.

155. This fee petition is signed by the attorney under penalty of perjury and subject to Rule 11 of the Federal Rules of Civil Procedure. Walker & Horwich, *supra* note 18, at 1463-64.

156. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6, 1052 app. (9th Cir. 2002) (charting attorneys' fees awards and multipliers in common fund cases of \$50 million to \$200 million from 1996 through 2001, and noting "a multiplier range of 0.6-19.6, with most (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0 range").

the multifactor lodestar method. Some states, however, choose to entrust full fee-calculating discretion to the particular judge rendering the fee award. In common fund cases, federal and state courts predominantly use either the percentage-of-recovery method or the lodestar method, with the percentage-of-recovery method being largely favored. Due to the continued problems arising from the percentage-of-recovery method, courts are increasingly endorsing the implementation of a lodestar cross-check in common fund cases.

### III. ANALYSIS

In privately negotiated fee arrangements, the market drives the fee-setting process.<sup>157</sup> When the responsibility of calculating attorneys' fees is placed with courts, either in the fee-shifting or common fund context, courts attempt to impute market forces into the calculation of the fee.<sup>158</sup> To that end, the lodestar method effectively simulates fees calculated in the private market through a standard hourly rate arrangement,<sup>159</sup> while the percentage-of-recovery method emulates contingency fee arrangements.<sup>160</sup> Despite using these ostensibly similar fee-setting techniques, controversy continues to surround the calculation of reasonable court-awarded attorneys' fees.<sup>161</sup> Much of the criticism stems from the artificial and arbitrary nature of affixing

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157. See Murr, *supra* note 6, at 600, 621–22 (discussing the market for legal claims in private fee negotiations); *Developments in the Law—The Paths of Civil Litigation*, *supra* note 144, at 1828 n.6 (stating that the price for legal services is controlled by competition in the marketplace).

158. See *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part and dissenting in part). Justice Brennan, addressing the calculation of court-awarded attorneys' fees, observed that “[a]s nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons.” *Id.* Accordingly, Justice Brennan continued, “judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market.” *Id.*

Similarly, in *Henry v. Webermeier*, Judge Posner noted that “the object of judicial fee determination is to simulate the results that would obtain if the lawyer were dealing with a paying client.” 738 F.2d 188, 195 (7th Cir. 1984).

159. *Henry*, 738 F.2d at 195.

160. *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 U.S. Dist. LEXIS 4786, at \*3–4 (E.D. La. Apr. 13, 1994) (“The percentage fee award was intended to approximate the market—what private counsel ordinarily would charge in a contingent fee contract.”).

161. See *generally Report on Contingent Fees*, *supra* note 3 (addressing the problems concerning court-awarded attorneys' fees in common fund cases); Walker & Horwich, *supra* note 18 (examining the problems associated with the use of the percentage-of-recovery method, and discussing whether courts should be required to use a lodestar cross-check); Kao, *supra* note 7 (discussing the inconsistent ways courts calculate fee awards in fee-shifting cases).

hourly compensation rates in fee-shifting cases and percentages in common fund cases *after* the litigation has ended.<sup>162</sup>

This Comment proposes a uniform system for calculating court-awarded attorneys' fees that encompasses the fee-shifting and common fund contexts. The proposed system is comprised of two steps. The first step requires courts to set all fee-seeking attorneys' hourly compensation rates at the outset of the litigation.<sup>163</sup> The second step requires courts to adopt appropriate fee-calculation methodologies that will be used at the conclusion of the litigation.<sup>164</sup> Because it would be inappropriate to use the same fee-calculation methodology for both fee-shifting and common fund cases,<sup>165</sup> this Comment argues for the adoption of two fee-calculation methodologies: a multifactor lodestar method for fee-shifting cases and a performance-based mathematical model for common fund cases.<sup>166</sup> By adopting a uniform fee-setting system that affixes the fee-seeking attorney's hourly compensation rate *ex ante* and assigns an appropriate fee-calculation methodology to the fee-shifting context and the common fund context, respectively, the economically interested parties to the litigation will share the same expectations about the calculation of the ultimate court-awarded fee—the parties will be aligned on the same “reasonableness continuum.” Aligning the parties' expectations should cause the ultimate fee award calculated by the court to be reasonable.<sup>167</sup> As demonstrated throughout the Analysis section, imposing a uniform fee-setting system will simplify and bring predictability to the fee-

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162. See Lynk, *supra* note 8, at 185. William Lynk highlights the anomaly of the calculation of court-awarded attorneys' fees in common fund cases by contrasting it to the typical price-setting process in a business transaction in the private market: “In most markets, willing and informed buyers and sellers set a price *before* a transaction is made. Although in many such instances *ex post* haggling may alter the amount ultimately paid . . . even here there is at least an *ex ante* price (or pricing formula) . . .” *Id.* (emphasis added). Noting the contrast between the private market and the fee-setting process for attorneys' fees in the common fund context, Lynk further states that “[t]he novelty is not that the ultimate amount of compensation is uncertain; plenty of business ventures have risky and uncertain payoff prospects. The novelty is that even the *terms* of any compensation, once the underlying business uncertainty has been wholly resolved, are completely unspecified.” *Id.* at 186. For instance, “an oil wildcatter may drill a dry hole or a gusher, but ordinarily he will in advance have split precisely the rights to the oil well with any coinvestors.” *Id.*

163. See *infra* Part III.B.

164. See *infra* Part III.C.

165. See *supra* notes 81–88 (discussing the adversarial differences at the fee-setting stage of fee-shifting and common fund cases that make endorsing a single methodology for both types of cases inappropriate); TASK FORCE REPORT, *supra* note 1, at 250–51 (presenting various criticisms of using the lodestar method to calculate fees in common fund and fee-shifting cases).

166. See *infra* Part III.C.

167. See *infra* Part III.A.

calculation process, conserve judicial resources, discourage abuses, and perpetuate fairness to attorneys and litigants.

A. *Reasonableness in the Context of Court-Awarded Attorneys' Fees*

Before one can propose a solution to the reasonable attorneys' fees conundrum, a workable framework in which to assess the reasonableness of court-awarded fees is needed. To begin constructing such a framework, this Comment urges that the only relevant parties to the reasonableness determination should be those who are economically affected by the fee award, namely, the payor and payee of the fee.<sup>168</sup> Focusing on these parties, this Comment offers a "reasonableness continuum" framework with which to evaluate the reasonableness of fee awards in both the fee-shifting and common fund contexts.

Reasonableness can be thought of as a continuum, with the opposite extremes of this continuum being reasonable and unreasonable.<sup>169</sup> On this continuum, a person will deem the occurrence of certain events more reasonable than the occurrence of others.<sup>170</sup> To determine where on a person's reasonableness continuum that person will deem the occurrence of a future event, the first step is to identify that person's initial *expectation* about the occurrence of the future event. The accuracy or inaccuracy of that person's initial expectation about an event will dictate where on that person's reasonableness continuum the occurrence of the event will fall (i.e., whether that person will consider the result reasonable or unreasonable). The more accurate the person's initial expectation about the future event turns out to be, the more reasonable the person should deem the event. Conversely, the more inaccurate the person's initial expectation, the more unreasonable the person should find the actual event.

Contingency fee agreements illuminate the workings of the reasonableness continuum theory. Suppose, for instance, that an individual hires an attorney to pursue a case for a 33% contingency fee. In entering into this agreement at the outset of the case, the attorney forms an expectation about a future event—the receipt of his fees.

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168. In fee-shifting cases, the payor is the defendant and the payee is the plaintiff's attorney; in common fund cases, the payors are the plaintiffs and the payee is the plaintiffs' attorney.

169. See *Lambert v. Blackwell*, 387 F.3d 210, 265 n.43 (3d Cir. 2004) (noting that "reasonableness is a continuum"); see also *Williams v. Taylor*, 529 U.S. 362, 409–11 (2000) (discussing the difficulty of defining reasonable and unreasonable); *Gardner v. Johnson*, 247 F.3d 551, 559 (5th Cir. 2001) (referring to Justice O'Connor's description of a reasonableness continuum in *Williams*).

170. See *Lambert*, 387 F.3d at 265 n.43 (observing that "[s]ome determinations might be more or less reasonable than others").

Because the terms of the contingency fee agreement specify how the fee will be calculated, the attorney specifically expects to receive 33% of any recovery amount. The client, too, forms an expectation about a future event—the payment of her attorney’s fees. Again, pursuant to the contingency fee agreement, the client expects to pay the attorney 33% of any amount recovered. Neither the attorney nor the client knows the precise amount of the fees, if any, yet both the attorney and client understand and expect that the compensation rate will be 33% of any monetary recovery. Because the attorney and the client both share the same initial expectation as to the calculation of the future attorney’s fees, they become aligned on the same reasonableness continuum—their understanding of what will constitute a reasonable fee is the same. Once an actual monetary amount is recovered in the litigation, regardless of the size of that monetary amount, the payment of the agreed-upon 33% fee causes the attorney and client’s shared initial expectation to be accurate. Thus, both the attorney and the client should deem the fee amount calculated through this 33% arrangement to be on the reasonable end of their reasonableness continuum. After all, each party received the benefit of its bargain.

Under this reasonableness continuum framework, the accuracy of a person’s initial expectations concerning the payment of attorneys’ fees contributes to that person’s ultimate estimate of the reasonableness of the actual amount of attorneys’ fees. Therefore, a critical component of any fee-setting system that seeks to produce a reasonable fee award is the alignment of the economically interested parties’ initial expectations as to the calculation of the ultimate fee.

Applying this reasonableness continuum framework to court-awarded attorneys’ fees, this Comment argues that by setting attorneys’ hourly compensation rates *ex ante* and adopting appropriate fee-calculation methodologies for fee-shifting and common fund cases, respectively, the economically interested parties to a case will share the same initial expectations about the calculation of the court-awarded attorneys’ fees, much like the parties to a private contingency fee agreement. Doing so, in turn, would align the parties on the same continuum of reasonableness. Once the lawsuit concludes, if the court honors the *ex ante* hourly compensation rate and utilizes the appropriate fee-calculation methodology for the particular type of case, the court-awarded fee will conform with the parties’ initial expectations (thereby making those expectations accurate), and the resulting fee amount will be considered reasonable by the economically interested parties.

*B. Setting Attorneys' Hourly Compensation Rates Ex Ante*

The first step in the proposed uniform fee-setting system is to require courts, in both fee-shifting and common fund cases, to set attorneys' hourly compensation rates at the outset of the litigation. Doing so should reduce the subjectivity that plagues the current fee-setting process where judges make the entire fee determination after the close of a lawsuit.<sup>171</sup> However, due to the different adversarial environments in the two categories of cases,<sup>172</sup> this Comment proposes one process for setting attorneys' hourly compensation rates in fee-shifting cases,<sup>173</sup> and another process for common fund cases.<sup>174</sup>

*1. Setting Ex Ante Hourly Compensation Rates in Fee-Shifting Cases*

In fee-shifting cases, attorneys' hourly compensation rates should be determined in an adversarial setting at a formal fee hearing at the outset of the litigation, and the rates should be based on an assessment of the attorneys' competing fee presentations. This Comment recommends that a special master or other assistant conduct these *ex ante* fee hearings with the parties.<sup>175</sup> During this fee hearing, the plaintiff's attorney should propose an hourly compensation rate he or she deems appropriate based on the attorney's experience and normal billing rates, along with any other evidence supporting the proposed rate the attorney thinks relevant.<sup>176</sup> The defendant should present reasons, if any, contesting the proposed rate. The defendant should also be permitted to offer evidence supporting its position. Based on these competing presentations, the court should decide the fee-seeking attorney's *ex ante* hourly rate. If the attorney is unsatisfied with the court-approved hourly rate, he or she can withdraw from the case, prior to having performed any substantive legal work.<sup>177</sup> As a general guideline, however, courts should approve hourly rates that

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171. See *supra* note 11 and accompanying text (discussing the subjectivity involved in calculating court-awarded attorneys' fees and the difficulty it creates for determining an appropriate fee-calculation methodology).

172. See TASK FORCE REPORT, *supra* note 1, at 250–53.

173. See *infra* Part III.B.1.

174. See *infra* Part III.B.2.

175. Pursuant to the Federal Rules of Civil Procedure, courts may refer matters pertaining to an attorney fee award to a special master. FED. R. CIV. P. 23(h)(4).

176. If more than one attorney from a law firm intends to work on the case, courts may want to require the lead attorney to submit an aggregate average hourly rate for the firm. However, courts should be wary of setting the aggregate hourly rate too high given the uncertainty as to which attorneys and staff will remain assigned to the case.

177. Should courts consider adopting the proposed uniform fee-setting system, Rule 1.16 of the ABA Model Rules of Professional Conduct, which governs the timing and ability of an attorney to terminate his or her representation of a client, may need to be modified

resemble the hourly rate the fee-seeking attorney typically charges in non-fee-shifting cases.<sup>178</sup>

## 2. *Setting Ex Ante Hourly Compensation Rates in Common Fund Cases*

Unlike in fee-shifting cases, there is no ready adversarial environment between the payor and payee of the fee at the fee-setting stage in the common fund context.<sup>179</sup> Therefore, the court should set the attorney's hourly compensation rate based on a good faith assessment of the documentation submitted by the fee-seeking attorney in support of the proposed rate. In making this assessment, courts should consider relevant factors such as an attorney's experience, specialty, and previously charged hourly rates. To be clear, however, the attorney's hourly rate should not include any enhancements for the contingent risk of the case.

Although it may seem that giving courts discretion to set the attorney's hourly rate injects subjectivity into the fee-setting process, much of the effects of this subjectivity can be alleviated by setting the attorney's hourly rate at the outset of the litigation. As in the fee-shifting context, setting compensation rates at the outset of the litigation should enable attorneys to make informed decisions upfront about whether they are willing to represent plaintiffs at the set rate. Attorneys who are dissatisfied with the subjectively determined *ex ante* rate can discontinue providing legal services.<sup>180</sup> Likewise, clients who are dissatisfied with the subjectively determined *ex ante* rate can withdraw from the litigation. Thus, the effects of this subjectivity are obviated at the outset.

### C. *Adopting Appropriate Fee-Calculation Methodologies for Fee-Shifting and Common Fund Cases*

The second step in the proposed uniform fee-setting system requires courts to adopt an appropriate fee-calculation methodology for the fee-shifting context and the common fund context, respectively, which courts can then use to compute a reasonable fee award at the end of the litigation. This Comment proposes that courts adopt a

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to permit an attorney to withdraw from the case at this stage in the litigation. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2003).

178. If a case settles prior to the court's determination of the attorney's hourly compensation rate, the parties should be required to specify and explain the agreed-upon hourly compensation rate in their settlement agreement.

179. *See supra* note 12.

180. *See supra* note 177.

slightly modified version of the multifactor lodestar method for use in fee-shifting cases,<sup>181</sup> and a performance-based mathematical model for use in common fund cases.<sup>182</sup>

1. *Fee-Shifting Cases: The Multifactor Lodestar Method*

This Comment alters the prevailing multifactor lodestar method by prohibiting any use of multipliers and limiting *ex post* fee adjustments or enhancements to “exceptional” cases only.<sup>183</sup> The proposed version of the multifactor lodestar method centers on the unenhanced time-rate lodestar calculation.<sup>184</sup> Under this proposed version, if the plaintiff prevails, the plaintiff’s attorney should submit to the court and the defendant a fee statement summarizing and describing the hours the attorney believes were “reasonably expended” during the litigation. Hours reasonably expended should exclude those spent on unsuccessful claims and those that are excessive, duplicative, or unnecessary.<sup>185</sup> To help ensure the legitimacy of the hours submitted, while also reducing the burden on the judiciary associated with reviewing the fee-seeking attorney’s billing records, courts should require attorneys to sign their fee petitions under penalty of perjury and subject to the sanctions imposed by Federal Rule of Civil Procedure 11.<sup>186</sup> Upon submission of the fee petition, the defendant should be permitted to object to specific hours it believes should be excluded; however, the defendant must provide a detailed explanation of the basis for each objection raised. The plaintiff’s attorney should then have the opportunity to respond to the defendant’s objections. If hours remain in dispute, the court should make the final

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181. See *infra* Part III.C.1.

182. See *infra* Part III.C.2.

183. While there is no bright-line rule as to what constitutes an “exceptional” case, several other areas of the law use “exceptional” as a benchmark. For example, the patent provisions of the *United States Code* allow courts to award attorneys’ fees in exceptional cases. 35 U.S.C. § 285 (2000). Courts that adhere to the strict lodestar method also limit adjustments to exceptional cases, although, again, no uniform definition for an exceptional case has emerged. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 899 (1984) (limiting adjustments to “those rare cases in which the success was ‘exceptional’”); *Hensley v. Eckhart*, 461 U.S. 424, 435 (1983) (“[I]n some cases of exceptional success an enhanced award may be justified.”).

184. See *supra* note 111 and accompanying text.

185. See *Hensley*, 461 U.S. at 440 (holding that hours expended on unsuccessful claims are not compensable); ARTHUR R. MILLER, ATTORNEYS’ FEES IN CLASS ACTIONS 7-8 (1980) (stating that excessive, unnecessary, and duplicative hours should be excluded from an attorney’s fee petition).

186. Rule 11 requires that “the allegations or other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation.” FED. R. CIV. P. 11(b)(3).

determination on whether the disputed hours were reasonably expended.<sup>187</sup> Once the number of reasonably expended hours is determined, this number should be multiplied by the attorney's *ex ante* hourly compensation rate. This calculation will produce the attorney's unenhanced time-rate lodestar amount.

After the court calculates the unenhanced time-rate lodestar amount, the court may, in exceptional circumstances, use the *Johnson* factors<sup>188</sup> or any applicable statutory criteria<sup>189</sup> to adjust the fee amount upward or downward. Adjustments should be made only in "exceptional" cases,<sup>190</sup> and any adjustment the court makes must be fully explained in the court's written opinion. A multiplier should *never* be used to adjust the time-rate lodestar; instead, any adjustment to the time-rate lodestar should be made to the specific hours the attorney expended on certain tasks. For example, if an attorney was particularly efficient throughout the discovery portion of the case, such as by minimizing the number of depositions taken or not objecting to all interrogatories or requests for production of documents, thus avoiding unnecessary discovery contests, the court may increase the number of reasonable hours the attorney expended on other discovery tasks. Because the unenhanced time-rate lodestar amount should generally represent a fair and adequate compensation to reflect the time and effort spent by the attorney, no adjustments or enhancements will be appropriate in the majority of cases.

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Utilizing the proposed multifactor lodestar method should promote uniformity, predictability, and accountability throughout the

187. Because providing adequate compensation to attorneys is one of the main goals of fee-shifting statutes, there should be a rebuttable presumption that the attorney's hours were reasonably expended.

188. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

189. *See, e.g., Manor Country Club v. Flaa*, 874 A.2d 1020 (Md. 2005). The specific language of the fee-shifting statute at issue in *Flaa* stated that

[i]n determining the reasonableness of attorney's fees claimed by the complainant, the Commission panel shall consider the following factors: (a) [t]ime and labor required; (b) [t]he novelty and complexity of the case; (c) [t]he skill requisite to perform the legal service properly; (d) [t]he preclusion of other employment by the attorney due to acceptance of the case; (e) [t]he customary fee; (f) [w]hether the fee is fixed or contingent; (g) [t]ime limitations imposed by the client or the circumstances; (h) [t]he experience, reputation and ability of the attorneys; and (i) [a]wards in similar cases.

*Id.* at 1026-27 (quoting Montgomery County Code § 27-7 (k)(1) (1987)). This subsection of the Montgomery County Code was repealed in 2001. The replacement subsection is now found at Montgomery County Code § 27-8 (2001).

190. *See supra* note 183 and accompanying text.

fee-setting process in fee-shifting cases by (1) ensuring that the unenhanced time-rate lodestar is consistently and objectively calculated by all courts, (2) reducing the subjectivity inherent in *ex post* assessments by limiting any adjustments to only exceptional circumstances, and (3) requiring courts to explain fully all adjustments made to the unenhanced time-rate lodestar amount. This method should also preserve judicial resources by shifting to the attorneys much of the work-intensive burden of reviewing and streamlining billing records in order to determine which hours were reasonably expended—the court’s only task will be to review the competing fee presentations.

The proposed multifactor lodestar method would also ensure that attorneys receive fair pay for the time they invested in the litigation because the attorneys will know their hourly compensation rate before doing any substantive legal work, the attorneys will know the fee-calculation methodology that courts must apply, and the courts’ ability to adjust fees arbitrarily *ex post* will be limited.<sup>191</sup> Reducing the risk that an attorney will perform work but not get compensated for it should tend to further the legislative intent underlying fee-shifting statutes by attracting competent attorneys to cases involving specific substantive rights deemed worthy of special protection.<sup>192</sup>

Standardizing the fee-calculation methodology in fee-shifting cases should also produce consistently calculated results from case to case and court to court. Such uniform application of the proposed version of the multifactor lodestar method would eliminate any potential fee advantage an attorney would gain by forum shopping between federal and state courts, resolve the confusion among different federal circuits and different courts within each state as to the appropriate fee-calculation methodology to use, and lessen an attorney’s desire to appeal a court-awarded fee because all fee awards in fee-shifting cases will be calculated the same way in all courts. Unnecessary satellite litigation concerning the calculation of the fee award may also be

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191. Under the proposed version of the multifactor lodestar method, a court would no longer have the ability to reduce an attorney’s fee award below the attorney’s lodestar based on an inappropriate cost-benefit analysis. *See Fla.*, 874 A.2d at 1037 (Bell, C.J., dissenting) (arguing against the use of a cost-benefit analysis when determining court-awarded attorneys’ fees because “[s]uch an approach, [given that] it requires the attorney’s fee award to be proportional to the monetary judgment award, is inconsistent with the purpose of the [fee-shifting statute], to allow, not discourage, access to the courts for meritorious . . . claims”).

192. *See supra* note 44 and accompanying text.

avoided.<sup>193</sup> Finally, the proposed multifactor lodestar method should simplify the reviewability of fee awards in fee-shifting cases because judges must provide a detailed explanation for any enhancement or adjustment made to the unenhanced time-rate lodestar amount.

2. *Common Fund Cases: The Performance-Based Mathematical Model*

a. *Considerations Reflected in Formulating An Appropriate Fee-Calculation Methodology for Common Fund Cases*

An appropriate fee-calculation methodology for computing court-awarded attorneys' fees in common fund cases must take into account several considerations unique to the common fund context. Specifically, it must: protect the financial interests of the unrepresented plaintiffs;<sup>194</sup> eliminate or reduce the subjectivity that currently plagues the common fund fee-setting process;<sup>195</sup> adequately compensate attorneys for the contingent risk inherent in the common fund context;<sup>196</sup> minimize the administrative burden of calculating an ap-

193. Cf. Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1534 (2006) (arguing that unnecessary satellite litigation in VoIP cases would be eliminated by permitting courts to avoid the purposefulness inquiry when determining personal jurisdiction over nonresident callers).

194. Because the plaintiff-defendant adversarial process vanishes at the fee-setting stage in common fund cases, TASK FORCE REPORT, *supra* note 1, at 251, two potential problems arise. First, there is no longer a built-in check as to whether the hours included in the plaintiffs' attorney's fee petition were reasonably expended. See *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) ("It is at this point . . . that the court is abandoned by the adversary system and left to the plaintiff's unilateral application and the judge's own good conscience."). Second, a financial conflict of interest arises for the attorney—the plaintiffs' attorney who was a champion for the plaintiffs' financial interests transforms into a claimant against that same fund created on their behalf. TASK FORCE REPORT, *supra* note 1, at 255. If there is no check on the size of the fee award, it is entirely possible that members of the class will be undercompensated because of an inflated attorneys' fees award. *Report on Contingent Fees*, *supra* note 3, at 465.

195. See Berger, *supra* note 5, at 284 (remarking that there are almost as many approaches to calculating reasonable attorneys' fees as there are judges).

196. See, e.g., *Report on Contingent Fees*, *supra* note 3, at 465 ("Without adequate fees for the class counsel, that representation would not be available.").

The age-old investment adage that "the higher the risk, the higher the return" applies equally in the common fund fee-setting process: "No 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." *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963). Therefore, in all common fund cases, the plaintiffs' attorney should be guaranteed a fee award that is more than his or her lodestar amount to account for the risk of nonpayment.

Scholars have proposed that doubling the attorney's time-rate lodestar amount provides an adequate compensation for attorneys who take contingent cases. See, e.g., John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 511 (1981) (endorsing "a doubled fee" (i.e., a multiplier of two) as an appropriate contingency multi-

propriate fee absent an adversarial fee-setting process;<sup>197</sup> and account for the zero-sum<sup>198</sup> nature of common fund fee awards.<sup>199</sup>

*b. A Proposed Model*

This Comment proposes a performance-based mathematical model as the appropriate fee-calculation methodology for courts to adopt in common fund cases. The performance-based mathematical model bases the court-awarded fee amount on the attorney's performance level in the litigation.<sup>200</sup> Under the proposed model, the attorney's performance in the litigation is determined vis-à-vis the difference between the total fund amount recovered by the attorney and the aggregate compensatory economic value of the plaintiffs' claims. The greater the difference between the total fund amount and the aggregate compensatory economic value of the plaintiffs' claims, the better the attorney is deemed to have performed. The better the attorney has performed, the larger the fee award the attorney

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plier). Consequently, the proposed performance-based model implies a contingent multiplier of two—it doubles the attorney's time-rate lodestar when the total fund amount equals the aggregate compensatory value of the plaintiffs' economic claims, and then adjusts the fee upward or downward based on the attorney's performance. Should courts find that the fees being produced by the model are systemically too low or too high, the contingent multiplier presently incorporated into the model can be adjusted by adding an appropriate coefficient to the beginning of each equation.

197. The administrative burden associated with court-awarded attorneys' fees in common fund cases arises largely from the submission of separate fee petitions from each attorney (or law firm) representing the plaintiffs. In complex class action suits, where there are often multiple attorneys representing different portions of the class, this results in voluminous fee statements that the court is then required to sift through for reasonableness. *See, e.g., In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 601 n.1 (3d Cir. 1984) (Becker, J., concurring) (noting that in one class action litigation, when the fee petitions submitted by the attorneys were stacked on top of each other, the combined height was over 27 feet); *In re Activision Sec. Litig.*, 723 F. Supp. at 1374 (describing the "mountain of computerized billing records" a court must review in its "solitary inquiry" into the fee award).

198. A zero-sum situation arises where "a gain for one side entails a corresponding loss for the other side." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 6, at 1376.

199. Awarding attorneys' fees in the common fund context pits the financial interests of the attorney against those of the client because the more money paid from the fund to the attorney, the less money remains in the fund to compensate the plaintiffs for their injuries. *See, e.g., Nilsen v. York County*, 400 F. Supp. 2d 266, 276 (D. Me. 2005) ("Every dollar I award the lawyers is a dollar that the class members will not recover and vice-versa."). The zero-sum nature of common funds mandates that an appropriate fee-calculation methodology not base the amount of the attorneys' fees solely on the size of the monetary recovery, as is currently done under the percentage-of-recovery method. At the same time, however, an appropriate methodology should not rely solely on the attorney's lodestar amount, as that would not produce the necessary financial incentive to attract competent attorneys to higher risk cases. *Report on Contingent Fees*, *supra* note 3, at 466.

200. *See infra* Part III.C.2.b(2)–(3).

will receive. Such a model should encourage attorneys and their clients to be co-equal winners by aligning the financial interests of the attorneys with the financial interests of their clients.

(1) *Variables Reflected in the Proposed Model*

The proposed performance-based model uses four variables to assess the attorney's performance and, in turn, generate a fee award. These four variables are the total fund amount, the aggregate compensatory economic value of the plaintiffs' claims, the attorney's abbreviated lodestar amount, and the attorney's requested fee amount. Each variable will be discussed in turn.

(a) *The Total Fund Amount*

In the proposed model, the total fund amount should equal the total monetary amount *in the fund* secured by the attorney on behalf of the plaintiffs. Only monies to be paid by the defendant into the common fund should be reflected in this amount.<sup>201</sup> The total fund amount need not equal the monetary equivalent of the total "benefit" of the recovery; in fact, any relief not monetarily reflected in the fund (even if quantifiably beneficial to the plaintiffs) should be excluded from the total fund amount.<sup>202</sup>

The rationale for excluding the value of any nonpecuniary relief is clear in light of the purpose and mechanics of the common fund doctrine—attorneys' fees are to be paid *from the monetary recovery*, not directly out of the plaintiffs' pockets. Moreover, as courts and legal scholars have agreed, it is virtually impossible to calculate accurately and objectively the monetary value of most types of nonpecuniary relief.<sup>203</sup> Forcing judges to undertake this extremely difficult and imprecise task would place too heavy a burden on the judiciary and compromise the objectivity of the performance-based model.

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201. In other words, even if the plaintiffs' attorney obtains nonpecuniary relief, such as injunctive or declaratory relief, which benefits the plaintiffs, the value of this relief ought not to be included in the total fund amount unless the defendant pays the monetary value of this relief into the fund.

202. As discussed *infra* at Part III.C.2.b(1)(b), although nonpecuniary relief should not be included in the total fund amount, the attorney is nevertheless compensated for the time and effort she spent achieving the nonpecuniary relief, as the hours expended in this endeavor are recorded in the attorney's abbreviated lodestar amount and then factored into the performance formulas.

203. See Berger, *supra* note 5, at 316 & n.145 ("Any attempt to quantify the results of [a case that does not give rise to a monetary recovery], and to reward the attorneys based even in part upon such determinations, is necessarily an arbitrary exercise.").

To demonstrate the calculation of the total fund amount, consider a hypothetical class action lawsuit against GSS Tire Manufacturers to recover for injuries sustained from tire explosions. After three years of intense litigation and a two-month trial, the jury returns a \$30 million judgment. The \$30 million judgment reflects plaintiffs' demand for compensatory damages, punitive damages, and a portion of the plaintiffs' litigation expenses. The judgment also orders GSS to redesign its manufacturing process to exclude the use of the chemicals that were determined to have originally caused the tires to malfunction. GSS estimates the total cost of the redesign plan to be \$5 million. Although the plaintiffs would benefit from the redesign, the estimated monetary value of this nonpecuniary relief (\$5 million) should not be included with the \$30 million when the court calculates the total fund amount, given that the defendant is not paying it into the fund.

(b) *The Aggregate Compensatory Economic Value of the Plaintiffs' Claims*

The aggregate compensatory economic value of the plaintiffs' claims should include only the plaintiffs' verifiable out-of-pocket expenses and economic losses that result from the defendant's wrongdoing. Thus, the only component of the aggregate compensatory economic value of the plaintiffs' claims should be the monetary amount necessary to make the plaintiffs "economically whole"—that is, the monetary amount needed to return the plaintiffs to the same economic position they were in prior to the defendant's actions.<sup>204</sup> Accordingly, punitive damages, litigation expenses, and monetary relief awarded for nonmonetary injuries, such as emotional distress and pain and suffering, should be excluded from the aggregate compensatory economic value of the plaintiffs' claims. Because the amount of the aggregate compensatory economic value of the plaintiffs' claims includes only the verifiable monetary injuries and losses sustained by the plaintiffs, this value could be calculated during the adversarial process, either during discovery or before the pretrial conference.

Returning to the GSS Tire Manufacturers hypothetical, suppose the plaintiffs produced medical bills, receipts, insurance payments, and other expenses related to the injuries from the exploding tires that totaled \$15 million. The plaintiffs' and defendant's expert wit-

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204. *Cf. Wright v. Nat'l Archives & Records Serv.*, 609 F.2d 702, 726 (4th Cir. 1979) (Butzner, J., dissenting) (stating that one of Title VII's dual policies is to make employees "economically whole").

nesses estimate the plaintiffs' projected lost future earnings to be approximately \$7 million. The aggregate compensatory economic value of the plaintiffs' claims would therefore equal \$22 million. The remaining \$8 million from the \$30 million judgment, which was intended to compensate the plaintiffs for emotional distress and to punish the defendant, would not be included in this value.

(c) *The Attorney's Abbreviated Lodestar Amount*

The attorney's abbreviated lodestar amount should equal the unenhanced time-rate lodestar—the product of the hours reasonably expended on the litigation multiplied by the attorney's *ex ante* hourly compensation rate.<sup>205</sup> This amount should reflect the fee the attorney would have received had she been paid contemporaneously on an hourly rate basis.<sup>206</sup> Any *ex post* adjustment to the unenhanced time-rate lodestar should be strictly prohibited. Unlike in the fee-shifting context, however, here an attorney would be permitted to include hours spent working on unsuccessful claims, since the defendants are no longer paying the attorneys' fees.

In operation, the attorney's abbreviated lodestar should be computed at the close of the litigation, after the fee-seeking attorney has submitted to the court a single fee petition<sup>207</sup> with detailed descriptions and explanations of all hours the attorney deems reasonably expended. Contrary to where the lodestar method is used as the sole fee-calculation methodology, the calculation of the abbreviated lodestar in the performance-based model “need entail neither mathematical precision nor bean-counting.”<sup>208</sup> To guard against attorneys “padding” their hours, attorneys should be required to sign their fee

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205. See *supra* note 111–112 and accompanying text (discussing the unenhanced time-rate lodestar).

206. Lynk, *supra* note 8, at 187.

207. Courts may want to require attorneys in complex common fund litigation to submit a single, aggregate fee petition rather than separate fee petitions from each attorney. *Cf.* CONTE, *supra* note 52, § 2:13 (noting that multiple attorneys in a single common fund case have filed a joint-fee application). If courts mandate, and strictly enforce, a rule that one reasonably expended hour will be deducted for every unreasonable hour the attorneys include in their aggregate fee petition, the plaintiffs' attorneys would have a strong incentive to police one another to ensure that only reasonable hours are included in their aggregate fee petition. This self-policing should reduce the administrative burden associated with reviewing, line-by-line, voluminous fee petitions. See *supra* note 197.

Prior to any fee being awarded, courts should also consider requiring multiple fee-seeking attorneys to agree on a specific method for apportioning the fee award, regardless of the ultimate amount awarded. Such a requirement should promote greater efficiency and reduce unnecessary costs during the fee-setting process.

208. *Cf. In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (discussing the calculation of the figure used for the lodestar cross-check).

petitions under the penalty of perjury and subject to Federal Rule of Civil Procedure 11.<sup>209</sup>

(d) *The Requested Fee Amount*

Following a settlement award or favorable judgment in a common fund case, the fee-seeking attorney should submit to the court a requested fee amount. The requested fee amount should consist of a fully reasoned, self-determined dollar amount of the total fund that the attorney believes is appropriate given an *ex post* assessment of the particular facts and difficulties of the case and the success achieved. While the ultimate calculation of the attorney's fee will be derived from the performance-based mathematical model, the requested fee amount will effectively establish the ceiling for the potential fee award; an attorney will never receive a fee that is larger than his or her requested fee amount. When requesting a fee amount, the attorney should be bound by the ethical constraints of professional responsibility to request only a fee amount that is reasonably related to the time and effort expended, contingent risk of the case, and success achieved.<sup>210</sup>

(2) *Determining an Attorney's Performance Level*

Using these four variables and basic algebra, this Comment sets forth a model for courts to use to determine attorneys' performance levels in common fund litigation. Specifically, this Comment proposes four possible performance levels on which an attorney could be placed: the "excellent" performance level; the "good" performance level; the "satisfactory" performance level; and the "poor" performance level.

For an attorney to reach the excellent performance level, the total fund amount less the aggregate compensatory economic value of the plaintiffs' claims must exceed the attorney's requested fee amount.<sup>211</sup> For an attorney to earn a good performance level, the total fund amount minus the aggregate compensatory economic value of the plaintiffs' claims will exceed the attorney's abbreviated lodestar

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209. Because there is no adversarial process to further ensure that the hours included in the fee petition were reasonably expended, there may be a need for harsher penalties and consequences should courts discover unreasonably expended hours in the fee petition. As suggested *supra* at note 207, one possible penalty could be to exclude one reasonably expended hour for every unreasonably expended hour the court finds in the fee petition. Random hours-checking by courts should produce a sufficient deterrent effect.

210. See *infra* note 217.

211.  $F - V > R$ , where  $F$  = the total fund amount;  $V$  = the aggregate compensatory economic value of the plaintiffs' claims; and  $R$  = the attorney's requested fee amount.

amount, but be less than the attorney's requested fee amount.<sup>212</sup> Attorneys who recover a total fund amount that is greater than the aggregate compensatory economic value of the plaintiffs' claims, but the difference between those two amounts is less than or equal to the attorney's abbreviated lodestar amount, would be grouped in the satisfactory performance level.<sup>213</sup> Finally, an attorney would be placed on the poor performance level when the aggregate compensatory economic value of the plaintiffs' claims exceeds the total fund amount recovered by the attorney.<sup>214</sup>

(3) *The Logistics of the Performance-Based Mathematical Model*

The mechanics of the performance-based mathematical model are intentionally straightforward so as not to cause any confusion among courts, attorneys, and clients.<sup>215</sup> In essence, there are two steps: First, determine the appropriate performance level in which to place the attorney; second, compute the attorney's fee amount using the specific performance formula applicable to the particular attorney's performance level.

The performance-based mathematical model operates as follows:

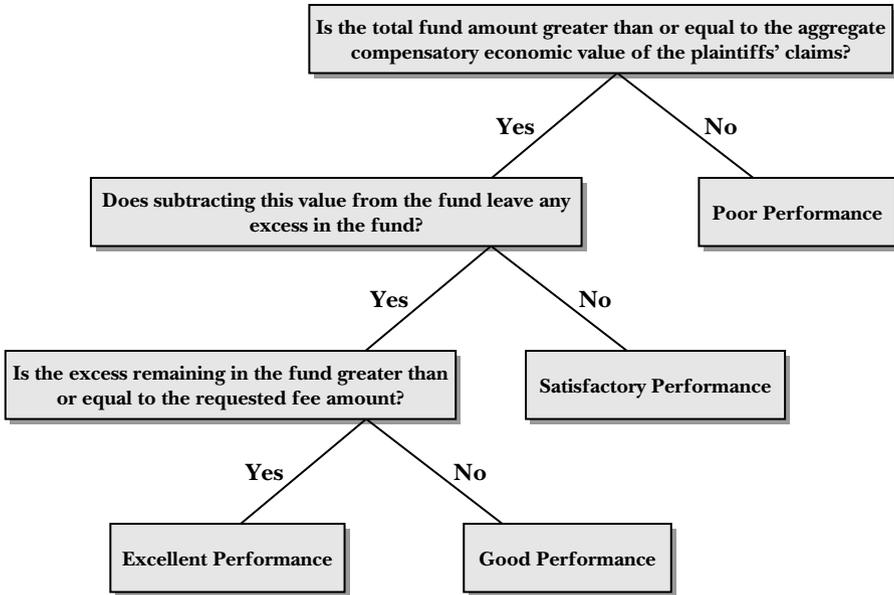
212.  $R > F - V > L$ , where  $F$  = the total fund amount;  $V$  = the aggregate compensatory economic value of the plaintiffs' claims;  $L$  = the attorney's abbreviated lodestar amount; and  $R$  = the attorney's requested fee amount. In this situation, the fund excess ( $F - V$ ) does not allow for the attorney's entire requested fee amount to be paid without detracting from the plaintiffs' compensatory economic recovery due to the zero-sum nature of common fund cases. Thus, to award the attorney his entire requested fee amount would mean the plaintiffs would not be made economically whole.

While making the plaintiffs economically whole is a primary objective of civil litigation and the proposed performance-based mathematical model, doing so cannot unequivocally supersede the attorney's right to receive adequate compensation for the time and effort he expended on the litigation. See *Report on Contingent Fees*, *supra* note 3, at 466 (noting that "[f]ees that are too stingy will result in under-enforcement of the law," but "[f]ees that are too easily available will lead to over-enforcement"). Although it may seem unsympathetic to prioritize the attorney's compensation over making the plaintiffs economically whole, it is a reality in *all* common fund litigation. See *id.* at 465 ("The class action could not fulfill its purposes if plaintiffs' attorneys did not receive adequate compensation for their efforts. These suits carry risk and the lawyers who bring them could find work doing other types of litigation."). Thus, the global goal of the proposed performance-based mathematical model is to make the plaintiffs as economically whole as possible by calculating the lowest adequate fee that still provides attorneys with a fair compensation amount.

213.  $F - V \leq L$ , where  $F$  = the total fund amount;  $V$  = the aggregate compensatory economic value of the plaintiffs' claims; and  $L$  = the attorney's abbreviated lodestar amount.

214.  $F < V$ , where  $F$  = the total fund amount; and  $V$  = the aggregate compensatory economic value of the plaintiffs' claims.

215. To be clear, the proposed performance-based mathematical model was not formulated using economic utility functions, regression analyses, game theory, or optimization modeling. Nevertheless, the simplicity of the model should contribute to its attractiveness.



The attorney's performance level—excellent, good, satisfactory, or poor—dictates the appropriate mathematical formula the court should use to calculate the court-awarded fee for that attorney. Each of the four proposed mathematical formulas are discussed in turn below.<sup>216</sup>

(a) *Excellent Performance Level*

When  $F \geq R + V$ , the court-awarded attorneys' fees amount should equal  $R$ .

To illustrate the excellent performance situation, suppose that DJM Lending Company wrongfully charged a prepayment penalty to persons who prepaid their home mortgage loans. Assume that there were 1,000 persons on whom these prepayment penalties were assessed, and that the total verifiable monetary amount of these prepayment penalties (i.e., the aggregate compensatory economic value of the plaintiffs' claims ( $V$ )) was \$20 million. Through the diligent efforts of the plaintiffs' attorney, DJM agreed to settle the case for \$24 million. Up to the time of the settlement, the plaintiffs' attorney spent 6,000 hours on the case and the court-approved *ex ante* hourly compensation rate was \$200 per hour. Accordingly, the plaintiffs' at-

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216. The performance formulas proposed in this Comment are not absolute. Should courts choose to pursue a performance-based mathematical approach to calculating court-awarded attorneys' fees in common fund cases, the proposed formulas should be subjected to rigorous testing and, if necessary, adjusted accordingly.

torney's abbreviated lodestar amount ( $L$ ) equals \$1.2 million. Given the difficulty and risk incurred in procuring the settlement, the plaintiffs' attorney submitted to the court a requested fee amount ( $R$ ) of \$4 million, or 16.67% of the total fund amount ( $F$ ). Therefore, in this situation,  $F = \$24$  million,  $V = \$20$  million,  $L = \$1.2$  million, and  $R = \$4$  million.

Because the total fund amount is greater than the sum of the aggregate compensatory economic value of the plaintiffs' claims and the attorney's requested fee amount ( $F \geq V + R$ ), the attorney's performance has created a "fund excess" of \$4 million. This fund excess would enable the attorney to receive her entire requested fee amount (\$4 million), while still permitting the plaintiffs to be made economically whole ( $F - R = \$20$  million =  $V$ ). Thus, awarding the attorney  $R$  for her excellent performance would be appropriate.<sup>217</sup>

217. It is important to clarify the rationale for awarding  $R$  to attorneys with an excellent performance level. In no situation will awarding  $R$  detract from the plaintiffs' ability to recover the entire aggregate compensatory economic value of their claims. In other words, for an attorney to receive  $R$ , the plaintiffs must be made economically whole, even after the attorneys' fees have been paid from the fund.

As discussed above, fee-seeking attorneys have discretion in choosing their requested fee amount. *See supra* Part III.C.2.b(1)(d). If, in the above DJM hypothetical, the attorney had requested \$3 million rather than \$4 million, paying the attorney \$3 million would be appropriate because the plaintiffs would still be made economically whole by the amount remaining in the fund. However, had the attorney requested \$5 million, or even \$4.1 million, the attorney would not have received that fee because awarding the attorney any amount above \$4 million would begin to detract from the plaintiffs' economic wholeness. Thus, if an attorney requested any amount above \$4 million, the attorney would no longer be classified on the excellent performance level.

A close analysis of the proposed model reveals a discontinuity point at the boundary between good and excellent performance, thereby creating the potential for large discrepancies in fee awards where only a few dollars, or even cents, separate one total fund amount from another. For instance, suppose that the attorney in the DJM hypothetical recovered \$23,999,999.99 rather than \$24 million. If the attorney still requested a fee of \$4 million, the attorney would be placed on the good performance level rather than the excellent performance level. Using the good performance formula introduced *infra*, the attorney's fee would equal \$2,903,690.65, whereas if the total fund amount was \$24 million, the attorney would receive the entire \$4 million fee.

Although at first glance this disparity seems arbitrary, in practice this situation should never occur because attorneys would adjust their requested fee amount accordingly to remain within the excellent performance level. For example, in the situation just posed, rather than requesting \$4 million and receiving only \$2,903,690.65, an attorney would request \$3,999,999.99, so that he or she would remain on the excellent performance level.

Although allowing attorneys to choose their requested fee amount suggests that attorneys would strategically choose the highest fee amount that would enable them to remain on the excellent performance level, thereby ensuring that attorneys receive the maximum fee possible from the performance-based model, permitting attorneys to choose their requested fee amount is *not* an automatic blank check for attorneys. It is crucial to remember that there are at least three constraints placed on the attorney who is submitting the requested fee amount: first, the requested fee amount will always be reviewed by the judge

*(b) Good Performance Level*

When  $R > F - V > L$ , the court-awarded attorneys' fees amount should be calculated as follows:

$$L + \{L * \{1 + [(F - V)/V]^{(1 - (V/F))}\} + \{[1 - (V/F)] * (F - V - L)\}\}$$

where

$F$  = the total fund amount

$V$  = the aggregate compensatory economic value of the plaintiffs' claims

$L$  = the attorney's abbreviated lodestar amount

To illustrate the good performance computation, suppose that the plaintiffs' attorney in the DJM Lending Company hypothetical secures a total fund amount of \$22 million rather than \$24 million ( $F = \$22$  million). In this scenario, if the aggregate compensatory economic value of the plaintiffs' claims ( $V$ ) remains \$20 million, there would be an excess in the fund of \$2 million:  $F - V = \text{excess}$ , so \$22 million - \$20 million = \$2 million. Assume the attorney's new requested fee amount ( $R$ ) is \$3.5 million, or 15.9% of the total fund amount ( $F$ ). Because the \$2 million excess in the fund is insufficient to pay the attorney her entire requested fee amount without deducting from the plaintiffs being made economically whole,<sup>218</sup> a more appropriate fee between \$1.2 million ( $L$ ) and \$3.5 million ( $R$ ) must be determined.

When attempting to determine what fee amount between \$1.2 million and \$3.5 million would be appropriate to award the attorney, several considerations should be kept in mind. First, had each of the 1,000 plaintiffs individually hired an attorney on a contingency fee basis,<sup>219</sup> and each attorney recovered the proportionate \$22,000 per plaintiff with a single compensatory economic claim value of \$20,000, each plaintiff would have had to pay his or her respective attorney approximately 33% of the \$22,000 recovery, or \$7,260. As a result,

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for reasonableness—is the requested fee amount reasonably related to the services performed by the attorney and the success achieved in the lawsuit?; second, the fee-seeking attorney will be required to submit a detailed explanation for the fee he or she is requesting; and, third, the fee-seeking attorney will be required to sign the fee request under penalty of perjury and subject to Federal Rule of Civil Procedure 11.

218. Awarding  $R$  to the attorney would cause the injured plaintiffs to receive \$18.5 million for their \$20 million economic loss:  $F - R$ , or \$22 million - \$3.5 million = \$18.5 million.

219. Assume that the contingency fee arrangement between the attorney and the plaintiff entitled the attorney to 33% of any monetary recovery.

this situation would have left each plaintiff with only \$14,740, while each plaintiff's economic injury was \$20,000.<sup>220</sup>

Second, the zero-sum nature of common funds requires that the equitable rights of both parties be considered.<sup>221</sup> Finally, when determining what fee amount between \$1.2 million and \$3.5 million would be appropriate to award the attorney, it is important to consider the economic principle of economies of scale.<sup>222</sup> Under these principles, an attorney who represents a single plaintiff at a contingency fee rate of 33% could not justify charging 1,000 plaintiffs (each of whom has a virtually identical substantive legal claim) the same 33% rate because the amount of effort the attorney need expend to successfully prove each claim would marginally decrease after she successfully proves the first claim. The good performance formula seeks to account for each of these considerations.

Using the good performance formula, the computation of the court-awarded attorneys' fee is as follows:

$$\begin{aligned} & \$1.2M + \{ \$1.2M * \{ 1 + [ (\$22M - \$20M) / \$20M ]^{(1 - (\$20M / \$22M))} \} + \{ [ 1 - \\ & \quad (\$20M / \$22M) ] * (\$22M - \$20M - \$1.2M) \} \} \\ & \quad \$1.2M + \{ \$1.2M * \{ 1.1^{(0.0909)} \} + \{ [ 0.0909 ] * (\$1.2M) \} \} \\ & \quad \$1.2M + \{ \$1.2M * (1.008702208) + (\$109,080) \} \\ & \quad = \$2,483,169.92 \end{aligned}$$

By awarding the attorney approximately \$2.5 million, the formula calculates an appropriate middle ground between \$3.5 million and \$1.5 million that provides the attorney with a compensation that fairly reflects the time spent and risk incurred by the attorney, while also providing the plaintiffs with the maximum economic recompense for their injuries.<sup>223</sup>

220. As discussed *infra*, using the good performance formula, each plaintiff would receive, after the payment of the attorney's fees, \$19,516, more than \$4,776 greater than what each plaintiff would have recovered under a 33% contingency fee arrangement.

221. See *supra* note 199 and accompanying text.

222. Economies of scale are achieved "[w]hen more units of a good or a service can be produced on a larger scale, yet with (on average) less input costs." Reem Heikal, *What Are Economies Of Scale?*, INVESTOPEDIA.COM, Jan. 27, 2003, <http://www.investopedia.com/articles/03/012703.asp>.

223. Some commentators who have reviewed the proposed performance formulas have suggested that the attorney's requested fee amount (*R*) be included as a variable in the "good," "satisfactory," and "poor" fee calculations. The argument is that including *R* would tend to allow for more linear fee awards across the various performance levels, while at the same time providing a mathematical check on the reasonableness of the fee amount requested by the attorneys.

To be sure, the attorney's requested fee amount (*R*) was purposely omitted from the good, satisfactory, and poor performance formulas for two reasons. First, it would be improper, and possibly undermine one of the proposed model's goals of reducing windfall

(c) *Satisfactory Performance Level*

When  $F \geq V$  and  $F - V > L$ , the court-awarded attorneys' fees amount should be computed as follows:

$$L + \{L * \{1 + [(F - V)/V]^{(1 - (V/F))}\}\}$$

where

$F$  = the total fund amount

$V$  = the aggregate compensatory economic value of the plaintiffs' claims

$L$  = the attorney's abbreviated lodestar amount

Continuing with the DJM Lending Company hypothetical, assume that  $V = \$20$  million, but  $F = \$21.2$  million. The attorney's abbreviated lodestar ( $L$ ) remains \$1.2 million. The attorney requests a fee ( $R$ ) of \$3 million, or 14.15% of the total fund amount ( $F$ ). In this situation, the attorney has done a satisfactory job in that she has recovered from DJM a total fund amount that fully compensates the plaintiffs for their economic injuries; however, any amount paid from the fund for attorneys' fees in excess of the attorney's abbreviated lodestar (\$1.2 million) will cause the plaintiffs to be undercompensated for their economic injuries—that is, it will detract from their economic wholeness.

Using the satisfactory performance formula, the court can ascertain a fee award between the attorney's abbreviated lodestar (\$1.2 million) and the attorney's requested fee amount (\$3 million) that will adequately compensate the attorney for the contingent risk of, and the success achieved in, the litigation, without unnecessarily detracting from the money available to compensate the plaintiffs for their economic injuries.

$$\begin{aligned} & \$1.2M + \{ \$1.2M * \{ 1 + [(\$21.2M - \$20M)/\$20M] \}^{(1 - (\$20M/\$21.2M))} \} \\ & \quad \$1.2M + \{ \$1.2M * \{ 1.06^{(0.0566)} \} \} \\ & \quad = \$2,403,964.42 \end{aligned}$$

Comparing the amount that each plaintiff would receive after the attorneys' fees are paid from the fund (\$18,796.04), with the recovery amount each plaintiff would have received had he hired his own attorney to prosecute the case under a 33% contingency fee agreement

fee awards, to permit attorneys to influence directly the ultimate fee award calculated by the courts. Second, by incorporating  $R$  into the good, satisfactory, and poor performance formulas, courts would be forced to perform a more exacting review of the attorney's requested fee amount, rather than using the "reasonably related to" standard this Comment proposes. See *supra* note 217. Therefore, because another goal of the model is to reduce the administrative burden on courts during the fee-setting stage, incorporating  $R$  into the formulas seems counterproductive.

(\$14,204), suggests that the plaintiffs would not be severely undercompensated for their economic injuries as a result of the payment of the calculated attorneys' fees award. Similarly, this fee award, which more than doubles the attorney's abbreviated lodestar amount, adequately compensates the attorney for the time and effort she expended as well as the contingent risk of the case.

(d) *Poor Performance Level*

When  $V > F$ , the court-awarded attorneys' fees should be computed as follows:

$$2L^{(F/V)}$$

where

$F$  = the total fund amount

$V$  = the aggregate compensatory economic value of the plaintiffs' claims

$L$  = the attorney's abbreviated lodestar amount

In this variation of the DJM hypothetical, suppose  $F = \$18$  million and  $V = \$20$  million. The attorney requests a \$2.4 million fee, or 13.33% of the total fund amount ( $F$ ). Under this circumstance, it would seem inequitable to award the attorney two times her abbreviated lodestar amount ( $L = \$1.2$  million), especially since the entire settlement amount recovered by the attorney could never make the plaintiffs economically whole, and any award of attorneys' fees from the fund will only further deplete their economic recovery. On the other hand, awarding the attorney solely her abbreviated lodestar amount would likely dissuade future attorneys from bearing the risk and cost of bringing this type of suit,<sup>224</sup> especially considering that attorneys could receive the same fee from a traditional hourly billed case.

Using the poor performance formula, courts can calculate a proper fee amount between \$1.2 million and \$2.4 million that seems to most equitably compensate the plaintiffs and the attorney.

$$\begin{aligned} & \$2.4\text{M} * (\$18\text{M} / \$20\text{M}) \\ & = \$2,160,000.00 \end{aligned}$$

c. *The Benefits and Weaknesses of Adopting a Performance-Based Mathematical Model for Common Fund Cases*

Despite the voluminous reports, studies, and articles addressing the calculation of court-awarded attorneys' fees in common fund

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224. *Report on Contingent Fees*, *supra* note 3, at 465–66.

cases, no fee-calculation methodology capable of adequately compensating attorneys without producing windfall fee awards has emerged.<sup>225</sup> The flaws of the percentage-of-recovery method and lodestar method are well documented;<sup>226</sup> the newly created lodestar cross-check similarly fails to resolve the subjectivity problem.<sup>227</sup> This Comment has provided a unique fee-calculation methodology premised on mathematically quantifiable criteria as opposed to a judge's subjective intuition.<sup>228</sup>

(1) *The Benefits of Adopting a Mathematical Approach*

Although adopting a mathematical approach may be seen as sacrificing substance on the altar of form,<sup>229</sup> the use of a mathematical model to calculate fee awards in common fund cases offers several advantages over the current fee-calculation methodologies being used by courts. First, a mathematical model would ensure that court-awarded attorneys' fees in common fund cases are calculated consistently across the country, thereby making fee awards more predictable

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225. *E.g., id.* at 466–67, 469–70 (addressing the current problems facing court-awarded attorneys' fees in class action litigation).

226. *See supra* Part II; *see also Report on Contingent Fees, supra* note 3, at 467–70 (describing the criticisms of the lodestar method and the percentage-of-recovery method).

227. As briefly mentioned in Part II, in response to the admitted subjectivity of selecting either a "reasonable percentage" for use in the percentage-of-recovery method or a contingency multiplier for use in the lodestar method, courts have begun to endorse the use of a lodestar cross-check as a means to ensure that the calculated percentage-based fee does not produce a windfall for the attorney. *See supra* notes 146–156 and accompanying text. The current application of the lodestar cross-check, however, is inherently flawed and, as such, it cannot accomplish its intended goal of monitoring subjectivity and promoting consistency in the court-awarded fees context.

The inherent problem with the lodestar cross-check is that there is no way for courts to assess objectively the reasonableness of the implied multiplier produced by the lodestar cross-check because the comparable "approved" multipliers that courts are using for the cross-check were themselves subjectively determined. Moreover, the "approved" multipliers that courts have used in other cases have little bearing on the level of success achieved by the particular attorney in the case presently before the court because the cross-check fails to consider the economic value of the plaintiffs' claims. Without an objective means to analyze the reasonableness of the implied multiplier of the percentage-fee award produced by the lodestar cross-check, courts are merely exchanging one subjective determination for another.

228. *See Report on Contingent Fees, supra* note 3, at 485 (noting that "[t]he court must substitute its judgment and discretion for the judgment of the market").

229. *See supra* notes 64 and 78 and accompanying text (criticizing the lodestar method as overly rigid and mathematical). *But see* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing Judge Learned Hand's famous algebraic expression,  $B = PL$ , which instructs potential tort parties to base their levels of precaution on three variables: (1) the probability ( $P$ ) that an accident will occur; (2) the magnitude ( $L$ ) of the resulting harm if any accident occurs; and (3) the cost of precautions ( $B$ ) that would reduce the expected harm).

for attorneys and their clients, while also reducing the incentives for attorneys to appeal the calculation of the award.<sup>230</sup> Second, calculating fees using a mathematical model should be a relatively simple, straightforward, and efficient task for judges, thereby potentially alleviating much of the administrative burden associated with determining reasonable attorneys' fees in common fund cases.<sup>231</sup> Third, using a mathematical model would enable attorneys to recover substantial fee awards for the work they invested, the contingent risk they incurred, and the success they achieved in the lawsuit without worrying that a court will, *ex post*, deem the fee amount unreasonable because the attorney would receive "too much money."<sup>232</sup> And fourth, adopting a mathematical model may discourage attorneys from bringing frivolous or marginal cases in hopes of receiving a lucrative fee award.

(2) *The Benefits of Using Performance as the Criterion for Basing the Fee Award*

Using the fee-seeking attorney's performance in the litigation as the basis for the ultimate fee amount is appropriate for several reasons. Unlike the contingent risk of a case,<sup>233</sup> an attorney's performance can be determined objectively at the end of the litigation by looking at the size of the monetary recovery as compared to the verifi-

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230. Uniformly adopting the proposed model would cause attorneys to have little, if any, incentive to appeal the reasonableness of a fee award because all courts would calculate court-awarded attorneys' fees in the same objective manner using the same performance-based mathematical model, thereby reducing unnecessary satellite litigation.

231. Properly applying the model would likely decrease the workload placed on the judiciary in calculating a reasonable fee because the work-intensive task of filtering the hours reasonably expended in the litigation, which are necessary to compute an accurate abbreviated lodestar amount, will be shifted to the attorneys. Attorneys would also be responsible for proposing a reasonable fee request, complete with detailed explanations as to how the requested amount was determined. As a result, courts should no longer need to get bogged down in reviewing the minutiae of attorneys' billing records.

232. The risk that a court may arbitrarily reduce an attorney's fee award to avoid paying him or her "too much money" is a real concern for attorneys. In *Gisbrecht v. Barnhart*, where the Court announced that attorneys' fees awarded pursuant to contingency-fee agreements should be adjusted downward when "the benefits are large in comparison to the amount of time counsel spent on the case," 535 U.S. 789, 808 (2002), Justice Scalia wrote in dissent that it would be irrational for courts to look at the fees arising from a case, after the attorney has incurred the risks, and "proclaim those consequences unreasonable because the attorney received too much money for too little work. That is rather like declaring the purchase of the winning lottery ticket void because of the gross disparity between the \$2 ticket price and the million-dollar payout." *Id.* at 810-11 (Scalia, J., dissenting).

233. See *supra* note 196 and accompanying text. But see generally Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943 (1998) (proposing a mathematical model that focuses on an options-based approach to determining an appropriate contingent risk multiplier in civil rights cases).

able economic injuries sustained by the plaintiffs. This assessment can be made without significant judicial involvement using the flowchart presented above.<sup>234</sup> Basing the fee award on the attorney's performance would also align the plaintiffs' attorney's financial interest in receiving a higher fee award with the plaintiffs' financial interest in receiving the most money for their injuries, thereby obviating the inherent financial conflict of interest that currently plagues common fund cases.

Furthermore, using the attorney's performance as a benchmark should create a fee award that more accurately reflects a fair recompense for the quality and amount of legal work actually performed by the attorney, rather than arbitrarily selecting a percentage that risks lacking any correlation to the amount of work expended on the case or the relative success achieved by the attorney. Linking the amount of the fee award to the attorney's performance should also reduce the occurrence of windfall fee awards that arise when the attorney represents a larger number of plaintiffs or plaintiffs with higher economically valued injuries. Connecting the attorney's fee to the attorney's performance should also ensure that injured plaintiffs receive the maximum possible recompense for their injuries.<sup>235</sup>

Finally, using performance as the criterion for an attorney's fee would eliminate any perceived disincentive to early settlement because the attorney's fee would not hinge directly on the number of hours the attorney spent on the litigation.<sup>236</sup> Instead, it should encourage attorneys to work efficiently to resolve the case as fast as possible and for the highest possible amount. This effect may also benefit defendants, who would avoid the high legal fees and adverse press traditionally associated with prolonged litigation.

### (3) *The Potential Criticisms of the Performance-Based Mathematical Model*

The proposed performance-based mathematical model is not without potential flaws. One possible criticism concerns the accuracy of the model's calculation of an attorney's performance. Specifically, this calculation may not always provide a complete assessment of the

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234. See *infra* Part III.C.2(a)(3).

235. By mandating that the full aggregate compensatory economic value of the plaintiffs' claims be collected from the defendant in order for the attorney to be placed on the excellent, good, or satisfactory performance level, the model should ensure that plaintiffs receive the maximum recompense needed to make them as economically whole as possible.

236. See *supra* note 133 and accompanying text (discussing the lodestar method's reliance on hours worked as a disincentive for early settlement in common fund cases).

attorney's performance, given that it fails to consider the strength of the attorney's adversary<sup>237</sup> and seemingly ignores the recovery of non-pecuniary relief.<sup>238</sup>

The problems with assessing performance, however, may not be too significant (economically, that is) when the ultimate fee award is calculated. In each performance formula, the attorney's abbreviated lodestar provides the starting point for calculating the fee amount; thus, attorneys will always be compensated for the actual amount of time expended on the litigation.<sup>239</sup> As a result, if the attorney faces an adversary with greater resources, or the attorney obtains significant nonpecuniary relief, the performance-based mathematical model will compensate the attorney for all the time he or she expended in these regards.

The mathematical model's emphasis on the aggregate compensatory economic value of the plaintiffs' claims also may receive criticism because this value may be rather difficult to determine in some complex cases, depending on the nature of the injuries and the number of plaintiffs. Undertaking this difficult process may inadvertently prolong the litigation, or even cause certain economic injuries, for which the plaintiffs lack sufficient documentation, to go uncompensated. Although these concerns are not without merit, the calculation of the aggregate compensatory economic value of the plaintiffs' claims seems amenable to being determined during the adversarial stages of the litigation. In fact, performing such a valuation seems necessary in any case where plaintiffs seek recompense for economic injuries.

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237. For example, suppose that Attorney *A* recovers \$7 million from a local cable company when his clients' claims have an aggregate compensatory economic value of \$5 million. Attorney *B*, on the other hand, battles against a multinational pharmaceutical company and recovers \$7 million for her clients whose claims have an aggregate compensatory economic value of \$6 million. Given the pharmaceutical company's resources, it is likely that *B* had much more difficult obstacles to overcome than did *A*, yet according to the performance-based model, *A* is deemed to have performed better.

238. Continuing with the example from *supra* note 237, because nonpecuniary relief is not included in the calculation of the total fund amount, if *B* obtains significant nonpecuniary relief on behalf of her clients but *A* recovers significant economic damages from the defendant because *A*'s clients have more serious economic injuries, *B* may be seen as not performing as well as *A*.

239. In the examples posed *supra* at notes 237 and 238, it stands to reason that more time and effort was required of *B* to prevail against a major pharmaceutical company than was from *A*; similarly, *B* also invested more time and effort in obtaining nonpecuniary relief than did *A*. Thus, when the two attorneys' respective fees are calculated, the hours expended by *B* that were dedicated to overcoming the greater difficulties and challenges posed by her adversary, or obtaining significant nonpecuniary relief, will still be adequately compensated by the mathematical model because the attorney's lodestar amount is a variable that is considered in the model. See *supra* note 202.

Making the aggregate compensatory economic value of the plaintiffs' claims a significant component in the model may also tend to overcompensate attorneys who represent clients in matters where a defendant's conduct is particularly egregious or morally reprehensible. This potential for overcompensation results from the fact that punitive damages are included in the total fund amount but excluded from the aggregate compensatory economic value of the plaintiffs' claims, thus giving the impression that an attorney performed well because there is a larger disparity between the total fund amount and the aggregate compensatory economic value of the plaintiffs' claims.<sup>240</sup> Because punitive damages are excluded from the aggregate compensatory economic value of the plaintiffs' claims, and in turn from the performance valuation, some attorneys may become less willing to take cases in which only compensatory economic damages are available.

A final possible weakness with the proposed performance-based mathematical model concerns potential double counting of the contingent risk of the case. The market rates used by courts in determining an attorney's *ex ante* hourly compensation rate may already reflect some of the contingent risk of nonpayment. Therefore, using a contingent multiplier of two may unnecessarily overcompensate the attorney. This double counting could be obviated, however, if courts make a concerted effort to avoid the temptation of considering contingent risk when setting an attorney's hourly rate at the outset of the litigation.

In sum, although the proposed performance-based mathematical model is not flawless, when it comes to calculating "reasonable" attorneys' fees, there can never really be a "right" answer. What the proposed model does do, however, is bring a necessary level of objectivity to the fee-calculation process in common fund cases, assuage many of the criticisms currently associated with calculating court-awarded attorneys' fees in the common fund context, and, at a minimum, serve as a catalyst for further discussion and exploration into the use of mathematical formulas as a means to deal with the common fund attorneys' fees conundrum.

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240. For example, in a case where punitive damages are awarded, the increase in the total fund amount due to the punitive damages does not necessarily provide an accurate reflection of the attorney's actual performance in the litigation when compared to the aggregate compensatory economic value of the plaintiffs' claims.

## IV. CONCLUSION

The judicial system would benefit greatly by adopting a uniform fee-setting system for calculating court-awarded attorneys' fees in fee-shifting cases and common fund cases that aligns the economically interested parties' expectations about the ultimate fee award. Setting attorneys' hourly compensation rates at the outset of the litigation should eliminate subjective *ex post* adjustments by courts that have, in the past, caused attorneys to be unfairly undercompensated for the amount of time and effort they invested in the litigation.<sup>241</sup>

Adopting the multifactor lodestar method as the appropriate fee-calculation methodology in the fee-shifting context should enable courts to determine objectively an initial fee amount while still affording judges limited discretion to adjust the fee amount in truly exceptional cases.<sup>242</sup> This method also should promote consistency and predictability regarding the calculation of attorneys' fees under fee-shifting statutes, further the legislative intent underlying those statutes, and provide greater accountability for the fee awards.

Adopting a performance-based mathematical model for use in common fund cases should eliminate much of the subjectivity currently plaguing the fee-setting process in those types of cases, reduce windfall fee awards that unfairly detract from the money intended to compensate the plaintiffs for their injuries, and assure attorneys that they will receive adequate compensation for taking high risk, contingency cases.<sup>243</sup> The performance-based model should also greatly reduce, and possibly eliminate, many of the current problems of arbitrariness and unpredictability associated with calculating fee awards in common fund cases, while at the same time minimizing the administrative burden on the judiciary and obviating attorneys' disincentives to early settlement.

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241. *See supra* Part III.B.

242. *See supra* Part III.C.1.

243. *See supra* Part III.C.2.