The Scope of Attorney’s Fees Under Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air

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INTRODUCTION

The award of attorney’s fees to successful litigants goes against the traditional American rule that each party bears the costs it incurs in litigation.¹ Although there are exceptions to the rule,² these exceptions do not provide for fees to public interest groups and private citizens who sue to enforce legislation. In 1975, the Supreme Court struck down a fee awarded for the successful prosecution of an environmental case by a public interest environmental group. The Court concluded that, absent statutory authorization, the American rule prohibited such an award.³ Partly in response to this ruling, Congress subsequently added fee award provisions to civil rights and environmental statutes.⁴ As a result, several federal environmental statutes now provide for the award of attorney’s fees to successful litigants in citizen suits.⁵ Congress included these fee award provisions to encourage statutory enforcement lawsuits by groups and individuals, who could not otherwise afford this costly litigation.⁶

Ever since their enactment, statutory fee award provisions have

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² For example, FED. R. Civ. P. 11 provides for the award of fees as a penalty for abusive litigation.
⁵ See statutes cited supra note 4.
sparked controversy. Statutes authorize "appropriate" and "reasonable" fee awards, yet fail to define these terms. Thus, the bulk of the litigation over fee awards focuses on when such awards are appropriate and what constitutes a reasonable fee.

The Supreme Court treated both these issues in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, a case brought under section 304 of the Clean Air Act. *Delaware Valley* concerned the award of attorney's fees to the Delaware Valley Citizens' Council for Clean Air (Delaware Valley) for its success in forcing the Commonwealth of Pennsylvania (Pennsylvania) to carry out a motor vehicle inspection and maintenance program as required by United States Environmental Protection Agency (EPA) regulations promulgated under the Clean Air Act. Pennsylvania challenged several aspects of the fee award. The Supreme Court unanimously upheld the baseline fee award. Rather than limiting the award to compensation for time spent in litigation, the Court agreed to include compensation for time spent in administrative proceedings. The Court thus expanded the scope of appropriate, and therefore compensable, work. However, in a six to three split, the Court reversed the lower court's enhancement of the award for the superior quality of the attorneys' work. This decision continues the Court's recent trend of limiting fee award enhancements. The Court also attempted to define what constitutes a reasonable attorney's fee award, but in this respect the Court's opinion raises as many questions as it answers.

Parts I and II of this Note describe the background of *Delaware Valley* and the proceedings in the lower courts. Part III examines the Supreme Court's opinion and reasoning in two sections. First, it analyzes the Court's affirmation of the award for work in administrative proceedings. Second, it considers the Court's rejection of the upward enhancement of the fee award and criticizes both the result and the reasoning behind it. Finally, this Note concludes that the majority's ruling

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10. 42 U.S.C. § 7604 (1982). Section 304(d), *id.* § 7604(d), provides: "The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section [the citizen suits provision], may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."
12. *See infra* text accompanying note 73.
13. *See infra* notes 78-90 and accompanying text.
may have eliminated the possibility of fee award enhancements, and that the lack of clarity in the Court's decision will be the source of further litigation on the issue of attorney's fee awards.

I

BACKGROUND OF THE CASE

In 1977, both Delaware Valley and the United States filed suit in federal district court to compel Pennsylvania to implement a vehicle emission inspection and maintenance program (IM program) as required by the Clean Air Act. The parties agreed to a consent decree that required Pennsylvania's Department of Transportation (PennDoT) to promulgate regulations for certifying private garages to perform the inspections. Pennsylvania did not comply with all the terms of the decree. It attempted to prohibit or delay implementation of the IM program in a variety of ways, and Delaware Valley challenged every attempt. The struggle between the two parties lasted nine years.

Briefly, the main events were as follows. At first, PennDoT delayed

16. 42 U.S.C. §§ 7401-7642 (1982); 40 C.F.R. §§ 52.2020-2059 (1986). The Environmental Protection Agency (EPA) regulations, promulgated under the Clean Air Act, require Pennsylvania to implement a program to reduce vehicle emissions. The section at issue in Delaware Valley, id. § 52.2038, requires Pennsylvania to submit to the EPA a compliance schedule showing the steps that would be taken to establish and enforce an inspection and maintenance program. Id.


18. For ease of discussion, the district court divided the postdecree proceedings into nine phases, 518 F. Supp. at 1422-31:

Phase I. The Pennsylvania General Assembly (Assembly) refused to enact the necessary franchise system. PennDoT failed to publish the regulations according to the schedule established in the decree. Although Delaware Valley requested a contempt hearing, PennDoT published the regulations before the hearing took place. The district court ordered the parties to revise the IM program implementation schedule.

Phase II. After publication of the regulations and the court order in September 1979, Delaware Valley monitored Pennsylvania's performance under the decree and submitted comments on the regulations.

Phase III. Pennsylvania requested and was granted a modification of the decree delaying implementation of the IM program from August 1980 until May 1981. The modification was approved by the court on March 7, 1980.

Phase IV. In February 1981, Pennsylvania asked Delaware Valley to agree to postponement of the already delayed implementation. Negotiations between the two parties failed, and in May the district court found Pennsylvania in violation of the decree. The court, after denying Pennsylvania's motion for reconsideration, nonetheless approved May 1, 1982 as the new deadline for implementation. The court of appeals affirmed both orders. 674 F.2d 976 (3d Cir.), cert. denied, 459 U.S. 905 (1982).

Phase V. The Pennsylvania Assembly passed a law prohibiting expenditure of state funds for the IM program. Act of Oct. 5, 1981, No. 99, 1981 PA. LAWS 4. PennDoT immediately ceased activities relating to the program's implementation and moved to stay the effect of the decree in light of the legislation. On January 22, 1982, the district court denied Pennsylvania's request, held Pennsylvania in civil contempt, and ordered the United States Secretary of Transportation not to approve any projects or monies for highways in designated areas, with
publishing the regulations. Once they were published, Pennsylvania obtained a modification of the decree to delay implementation of the program. After this modification, Pennsylvania asked for a further postponement; Delaware Valley protested, and the district court found Pennsylvania in violation of the decree. The Pennsylvania Assembly then passed a law prohibiting expenditure of state funds for the IM program. Upon Delaware Valley's motion, the district court held the state in civil contempt and as a sanction ordered the federal Department of Transportation (DoT) not to approve projects for the two geographic areas covered by the decree. In 1983, the Assembly finally passed legislation allowing implementation of the IM program. The litigation continued even after the state's legislative authorization, however, because the Pennsylvania Supreme Court declared the decree a nullity. The federal district court ruled against the state's supreme court and denied Pennsylvania's motion to vacate the decree pursuant to the state court's ruling. 19

For ease of description and analysis, the district court divided the foregoing series of events into nine “phases” and calculated separate fee awards for each phase. 20 The awards at issue in Delaware Valley included those for: Phase II, when Delaware Valley commented on PennDoT's regulations for the IM program; Phase V, when Delaware Valley blocked Pennsylvania's attempt to stay the effect of the decree and the district court found Pennsylvania in contempt; and Phase IX, when Delaware Valley participated in EPA hearings on the IM program's certain exceptions. The court of appeals upheld the orders. 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982).

Phase VI. Delaware Valley successfully opposed attempts by state legislators and the city of Pittsburgh to intervene in the litigation. 674 F.2d 970 (3d Cir.), stay denied, 458 U.S. 1125 (1982).

Phase VII. Pursuant to its order to the Secretary of Transportation not to certify any projects for the two areas covered by the decree, DoT approved funding for seven Pennsylvania highway projects. The district court found that five of the seven proposals failed to qualify as exceptions under the court's order and thus approved only two. 551 F. Supp. 827 (E.D. Pa. 1982).

Phase VIII. In May 1983, the Assembly passed legislation allowing implementation of the IM program. 75 PA. CONS. STAT. §§ 4706-4707 (1984). Delaware Valley and Pennsylvania then negotiated a new compliance schedule. The district court approved the schedule and vacated the contempt sanction on May 16, 1984.

Phase IX. Delaware Valley participated in EPA hearings, during which Pennsylvania failed to obtain EPA approval of a proposed IM program covering a smaller geographic area than that required under the decree. Delaware Valley was also involved in related state court litigation that ended in the Pennsylvania Supreme Court declaring the decree a nullity. Burd v. Pennsylvania, 66 Pa. Commw. 129, 443 A.2d 1197 (1982); Scanlon v. Pennsylvania Dep't of Transp., 502 Pa. 577, 467 A.2d 1108 (1983). The district court, however, denied Pennsylvania's motion to vacate the decree pursuant to the state court's decision. The appeals court affirmed. 755 F.2d 38 (3d Cir.), cert. denied, 106 S. Ct. 67 (1985).

20. See supra note 18.
The attorneys for Delaware Valley requested attorney's fees and costs for their work in the postdecree phases, including their work in administrative proceedings. The district court, after eliminating certain hours, awarded Delaware Valley counsel $209,813 in fees and $6,675.03 in costs. The Court of Appeals for the Third Circuit affirmed.

The district court awarded fees for Delaware Valley counsel's work in two sets of administrative proceedings, rejecting Pennsylvania's contention that such fees were inappropriate because the work did not involve litigation. The Clean Air Act permits compensation for "any action" but does not mention compensation for "proceedings," as do other fee award statutes such as the Civil Rights Attorney's Fees Awards Act. Thus, the language of the Act could be read to limit attorney's fee awards to litigation work. The court, however, ruled that Delaware Valley's administrative activities were "sufficiently related to [the decree's] goals and the ongoing litigation" to be compensated. The court reasoned that Delaware Valley had a legitimate interest in commenting on PennDoT's regulations establishing the IM program because the regulations were material to Pennsylvania's compliance with the decree and to Delaware Valley's rights thereunder. Similarly, Delaware Valley counsel's participation in EPA hearings was related substantially to the litigation because EPA modification of the IM program also would have affected Delaware Valley's rights under the consent decree.

21. See supra note 18 for a description of the phases.
22. Phases II and IX, supra note 18.
23. The district court eliminated more than one-third of the hours requested by Delaware Valley. Hours were eliminated because of insufficient documentation, because the court would not compensate two attorneys for preparing for and attending the same hearings, because certain proceedings for which compensation was requested were not essential to protect Delaware Valley's rights, and because the court decided that for certain phases a smaller number of hours was reasonable. Delaware Valley, 581 F. Supp. at 1420-29.
24. Id. at 1433.
27. See supra note 10 for the relevant text of the statute.
31. Id. at 1423; see supra note 18 for a description of Phase IX.
32. Delaware Valley, 581 F. Supp. at 1430; see supra note 18 for a description of Phase IX.
To determine the reasonable fee award, the district court employed what is known as the "lodestar method." First developed by the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, and refined in subsequent cases, the lodestar method multiplies reasonable hours worked by a reasonable hourly rate. The hourly rate is based on the attorney's reputation, experience, and status, and on the type of activity involved. The resulting figure is dubbed the "lodestar." Once the lodestar is established, it may then be adjusted upward or downward according to the contingency of success, the quality of the work performed, and the actual results achieved. Under this method, the party requesting fees has the burden of proving that it is entitled to an award and to any adjustment of the lodestar.

The lodestar method is not the only one used by courts to calculate reasonable attorney's fee awards. The Fifth Circuit has taken another approach. In *Johnson v. Georgia Highway Express, Inc.*, the Fifth Circuit developed a method whereby the fee award is determined in light of twelve factors. Several courts have followed *Johnson*.

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33. 487 F.2d 161, 167 (3d Cir. 1973) [hereinafter *Lindy I*] (first inquiry court makes should be into how many hours were spent, in what manner, and by which attorney).

34. *Delaware Valley*, 581 F. Supp. at 1429 (citing *Lindy I*, 487 F.2d at 167); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) (following calculation of lodestar, baseline fee may be adjusted to reflect quality of work, benefit to client, and contingency of result); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (en banc) [hereinafter *Lindy II*] (in addition to the "lodestar," attorney's fees should reflect contingent nature of success and quality of attorney's work); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975) (failure to consider status and reputation of each attorney when setting hourly rates for lodestar calculation may be error).


36. Id. (citing *Lindy I*, 487 F.2d at 167).

37. The word "lodestar" means "a star that leads or guides, especially the Polestar;" or "someone or something that serves as a guiding star or as a focus of hope or attention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1329 (1976).

38. *Delaware Valley*, 581 F. Supp. at 1419, 1431; *Lindy I*, 487 F.2d at 169; *Lindy II*, 540 F.2d at 117.

39. *Delaware Valley*, 581 F. Supp. at 1419. In attorney's fee cases, the party requesting the fee has the burden of establishing that it is entitled to such an award. See, e.g., *Lindy II*, 540 F.2d at 117.

40. 488 F.2d 714 (5th Cir. 1974).

41. The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. These factors were taken from the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980) (disciplinary rule regarding fees for legal services).

42. See, e.g., Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (upholding attorney's fee awarded under Civil Rights Act supported by detailed findings of fact on each of the twelve *Johnson* factors); Kerr v. Screen Extras Guild, Inc., 527 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976) (failure to consider *Johnson* factors constitutes abuse of dis-
The Supreme Court, in *Hensley v. Eckerhart*,\(^4\) combined the lodestar method with the *Johnson* factors. It called the lodestar an “objective” basis upon which to make an initial estimate of the reasonable fee.\(^4\) It then noted that special considerations could “lead the district court to adjust the fee upward or downward.”\(^4\) In general, however, the twelve factors identified in *Johnson* would be included in the lodestar figure and therefore should not ordinarily be used to adjust it.\(^4\)

Following the methodology and reasoning of both *Hensley* and Third Circuit decisions,\(^4\) the district court in *Delaware Valley* determined lodestar figures for the different postdecree proceedings or phases, using different hourly rates for the different types of legal work involved.\(^4\) The court then adjusted the lodestar figure upward for Phase V, the phase that culminated in the contempt sanction.\(^4\) It multiplied the lodestar for this phase by a factor of two because of the “superior quality” of the work and the “outstanding result” achieved.\(^4\) The district court found that Delaware Valley counsel’s work in this phase “helped not only this court but also the court of appeals” in its decision to countermand the action by the state legislature prohibiting funds for the IM program.\(^5\)

The district court also applied a multiplier of two to lodestars for three phases to reflect the “contingent nature” of Delaware Valley’s success during those periods.\(^5\) The court justified this contingency multiplier on two grounds: the case involved legal theories with little precedent, and Delaware Valley had to face formidable adversaries—the state and federal governments—to obtain the decree and then to ensure compliance with it.\(^5\)


\(^4\) Id. at 433.

\(^4\) Id.

\(^4\) Id. at 434 n.9.

\(^4\) Ursic v. Bethlehem Mines, 719 F.2d 670, 674 (3d Cir. 1983) (counsel not entitled to bonus beyond lodestar where neither lower court nor petitioner set forth any facts or rationale to support it); Lindy II, 540 F.2d at 117; Lindy I, 487 F.2d at 169.

\(^4\) The district court used three different hourly rates: $100 per hour for the “most difficult” legal work; $65 per hour for work that could be done by an associate level attorney; and $25 per hour for work that required little or no legal ability. *Delaware Valley*, 581 F. Supp. at 1422.

\(^4\) See supra note 18 for a description of Phase V.

\(^4\) *Delaware Valley*, 581 F. Supp. at 1431.

\(^4\) Id.

\(^4\) *Id.* The contingency multiplier was applied to Phases IV, V, and VII. (Thus Phase V had, with the quality multiplier of two, a total multiplier of four.) See supra note 18 for a description of these phases.

\(^5\) *Delaware Valley*, 581 F. Supp. at 1431.
The Third Circuit Court of Appeals affirmed the district court's fee award.\textsuperscript{54} The appeals court agreed that the time spent by Delaware Valley counsel in regulatory proceedings was compensable because it was both sufficiently related to the litigation and necessary to ensure compliance with the decree.\textsuperscript{55} The court commented that the district court’s rationale for these awards was consistent with the criteria set out by the Supreme Court in \textit{Webb v. County Board of Education,}\textsuperscript{56} decided after the district court had ruled on \textit{Delaware Valley}. In \textit{Webb}, the Supreme Court held that under the Civil Rights Attorney’s Fees Awards Act\textsuperscript{57} the district court had discretion to award attorney’s fees for time spent by counsel in optional administrative proceedings if the work “was both useful and of a type ordinarily necessary” to prevail in the litigation.\textsuperscript{58}

The appeals court in \textit{Delaware Valley} also upheld the multipliers for quality and for risk. The court stated that the lodestar increase was a matter left “to the sound discretion of the district court,”\textsuperscript{59} and could be reversed only if the trial court either failed to apply correct standards and procedures or made “clearly erroneous” findings of fact.\textsuperscript{60} To determine whether there was such an abuse, the Third Circuit examined whether the district court had employed proper standards based on the then recent Supreme Court decision in \textit{Blum v. Stenson,}\textsuperscript{61} an opinion also rendered after the district court’s decision in \textit{Delaware Valley}. In \textit{Blum}, the Supreme Court reversed a district court’s decision to increase the lodestar awarded under the Civil Rights Attorney’s Fees Awards Act where the increase was based on, \textit{inter alia,} the complexity of the litigation, the novelty of the issues, the quality of work, and the “riskiness” of the suit.\textsuperscript{62} The Supreme Court reasoned that novelty and complexity were already reflected in the lodestar. Similarly, “‘quality of representation’ . . . generally is reflected in the reasonable hourly rate.”\textsuperscript{63} Superior quality could justify an increase in the lodestar only in “rare” cases where the plaintiff demonstrated, with specific evidence, the high quality of the work.\textsuperscript{64} \textit{Blum} explicitly left unanswered the question of whether the riskiness of a particular suit could justify an upward adjustment of

\begin{thebibliography}{9}
\bibitem{55} Id. at 276-77.
\bibitem{56} 471 U.S. 234 (1985).
\bibitem{58} 471 U.S. at 243-44.
\bibitem{59} 762 F.2d at 281.
\bibitem{60} Id.
\bibitem{61} 456 U.S. 886 (1984) (district court abused its discretion in awarding 50% upward adjustment in civil rights class action because respondent failed to carry its burden of proof that the adjustment was necessary for a reasonable fee award).
\bibitem{62} Id. at 902.
\bibitem{63} Id. at 899.
\bibitem{64} Id.
\end{thebibliography}
the lodestar.\textsuperscript{65}

The appeals court found the \textit{Delaware Valley} case to be "most unusual, and therefore a rarity,"\textsuperscript{66} citing the efforts of the Pennsylvania state government to avoid enforcement of the federal court's orders through "devious formal actions."\textsuperscript{67} Delaware Valley counsel "fought the powerful Commonwealth apparatus every inch of the way, through complicated detours and treacherous road blocks."\textsuperscript{68} Delaware Valley counsel "performed exceptional services in vindicating the dignity of the federal court system" in the district court's confrontation with the executive, legislative, and judicial systems of the state.\textsuperscript{69} Hence, the district court's finding that a lodestar figure should be increased because of the quality of work performed was not clearly erroneous, and it was consistent with \textit{Blum}.\textsuperscript{70} Similarly, the contingency multiplier was not clearly erroneous because the court in \textit{Delaware Valley} had specifically identified the risks involved.\textsuperscript{71} Thus, the question left open in \textit{Blum} was answered by the Third Circuit: the contingency of success could justify an increase in the lodestar.\textsuperscript{72}

Pennsylvania appealed to the Supreme Court on three grounds. First, it appealed the awards in Phases II and IX, arguing that the Clean Air Act was not intended to compensate work in administrative proceedings. Second, it argued that the multiplier for quality was inappropriate and inconsistent with \textit{Blum}. Finally, it contended that a multiplier for

\begin{itemize}
\item \textsuperscript{65} \textit{id.} at 901 n.17.
\item \textsuperscript{66} \textit{Delaware Valley}, 762 F.2d at 281.
\item \textsuperscript{67} \textit{id.} The appeals court described these actions as follows:
First, Pennsylvania's legislature enacted a state law deliberately designed to prohibit state officers from respecting the federal court order.
Second, because the state then stood to lose $700,000 in Clean Air Act funds for state highways in 1982, the legislators repealed the ill-fated legislation, and permitted the implementation of the inspection and maintenance program if necessary to avoid the loss of federal funds.
Third, after receiving the federal funds for its highways because of compliance with the federal court order, the Commonwealth, acting through certain state legislators—desiring the financial benefits of federal largesse without intending to satisfy the federal requirements for it—successfully brought an action in its own court system, resulting in a judgment of the Supreme Court of Pennsylvania that called the federal court order "a nullity."
\textit{id.} (citations omitted).
\item \textsuperscript{68} \textit{id.}
\item \textsuperscript{69} \textit{id.} The court said that Delaware Valley had walked the tight, and sometimes imperceptible, line that divides the competencies of two governmental sovereignties, insuring full compliance with federal legislation designed for the safety and protection of the citizens, and vigorously battling a state governmental system that sought to defy a lawful order of this court system by resorting to discredited concepts of nullification, first by its legislature and next by its supreme court.
\textit{id.}
\item \textsuperscript{70} \textit{id.} at 282.
\item \textsuperscript{71} \textit{id.}
\item \textsuperscript{72} \textit{id.} The court did acknowledge that the question remained open at the Supreme Court level. \textit{id.}
risk was never appropriate.73

III
SUPREME COURT OPINION AND ANALYSIS

The Supreme Court examined two issues in Delaware Valley: (1) whether the Clean Air Act authorizes attorney’s fee awards for time spent by counsel participating in regulatory proceedings, in addition to time spent in litigation, and (2) whether a court may enhance an award to reflect the superior quality of representation.74 It left the question of contingency multipliers unanswered, setting the issue for reargument.75 The Court unanimously upheld the fee award for the Delaware Valley attorneys’ work in administrative proceedings,76 but in a six to three split it reversed the upward adjustment of the lodestar for superior quality representation.77

A. Compensation for Work in Administrative Proceedings

1. The Court’s Decision and Reasoning

The Court upheld the fee awards for nonlitigation work,78 finding that under section 304(d) of the Clean Air Act,79 counsel may be compensated for work performed outside the context of traditional litigation if that work directly relates to the outcome of the litigation.80 In a broad construction of section 304(d), the Court rejected Pennsylvania’s argument that the plain language of the section limits the award of fees to litigation work, even though on the face of the statute this reading is plausible.81 The Court likened the Clean Air Act provision to the attorney’s fees provision in section 1988 of the Civil Rights Attorney’s Fees Awards Act of 1976, which grants attorney’s fees to prevailing parties in “any action or proceeding” brought to enforce the Civil Rights Act.82 The Court reasoned that section 304 should be construed in the same manner as section 1988, under which many courts have awarded compensation for postjudgment monitoring of consent de-

75. Id. at 3090.
76. Id. at 3096.
77. Id. at 3100.
78. Phases II and IX, supra note 18.
80. 106 S. Ct. at 3094-96.
81. Id. at 3094; see supra note 10 for the relevant statutory language.
82. 42 U.S.C. § 1988 (1982). The Act provides that “[i]n any action or proceeding to enforce” the Civil Rights Act, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”
The Court found that although section 304 includes only the phrase "any action," as opposed to the more liberal "any action or proceeding" of section 1988, Congress had used the terms "action" and "proceeding" interchangeably in the legislative history of section 304 and hence did not intend to limit fee awards under section 304 to traditional judicial actions. The Court concluded that the "nearly identical" purposes behind section 1988 and section 304 were more important than their disparate phrasing and, therefore, the statutes should be applied similarly.

The Court also affirmed the Third Circuit's finding that the postlitigation work done by Delaware Valley counsel met the standard of *Webb v. County Board of Education*. *Webb* permits compensation for work that is "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation. The Court agreed with the district court's reasoning that the participation by Delaware Valley counsel in administrative proceedings "was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." Furthermore, using criteria stated in Justice Brennan's concurring opinion in *Hensley v. Eckerhart*, the Court found that the compensation awarded was "well within" the "zone of discretion" standard applicable to review of the district court decision.

2. **Discussion**

*Delaware Valley* is the first Supreme Court case to rule on whether nonlitigation work by an attorney is compensable under the Clean Air Act. This decision not only clarifies the scope of compensable work.
under the Clean Air Act but also strongly suggests that the Supreme Court will construe broadly other fee award provisions that make some postlitigation work compensable.

The Court's ruling is not entirely surprising in light of the trend established by cases under other statutes where lower courts have compensated attorneys for time spent in postjudgment activities. The Court's decision, however, was by no means guaranteed. In Webb, for example, where the Court held that the nonlitigation work at issue was not of the type necessary to advance the litigation, the Court suggested that no such work could be compensable. In a footnote, the Court referred to the legislative history of section 1988 of the Civil Rights Attorney's Fees Awards Act, which spoke of civil rights enforcement "in suits," "through the courts," and "by judicial process"—language the Court interpreted to mean that nonlitigation work could not be compensated. The Court in Webb also cited its decision in Hensley, which referred to compensable time as that "reasonably expended on the litigation." The Court in Delaware Valley, however, did not rely on its previous interpretation of the legislative history as expressed in the Webb footnote. Instead, it chose to apply its interpretation of section 1988 to the Clean Air Act, and by extension to all fee award statutes.

The Court's interpretation of section 304 should provide guidance for those lower courts that have denied fee awards in similar cases. The First Circuit Court of Appeals is one such court. In Roosevelt Campobello International Park v. EPA, the First Circuit refused to award fees

York had a law requiring administrative proceedings prior to seeking judicial redress for employment discrimination. Thus, through a combination of federal and state statutes, the plaintiff was required to take part in prelitigation activities. This holding, therefore, is confined to its particular facts, as evidenced by the Court's opinions in Blum and Delaware Valley, neither of which cited to the case.

92. See, e.g., Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980) (district court properly granted fees for postsummary judgment work to secure compliance with an order under 42 U.S.C. § 1988); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980) (district court did not abuse its discretion in awarding fees for postjudgment motions and petitions that helped to enforce compliance with an injunction and contributed to the vindication of rights under 42 U.S.C. § 1988); Northcross v. Board of Educ., 611 F.2d 624, 637 (6th Cir. 1979) (advice to district court on remand of case under 42 U.S.C. § 1988 included statement that "[s]ervices devoted to reasonable monitoring of the court's decrees ... are compensable services [because] they are essential to the long-term success of the plaintiff's suit").


94. Id.

95. 471 U.S. at 242 (citing Hensley, 461 U.S. at 433) (emphasis added by the Webb Court).

96. See, e.g., Roosevelt Campobello Int'l Park Comm'n v. EPA, 711 F.2d 431 (1st Cir. 1983); Florida Power & Light Co. v. Costle, 650 F.2d 579 (5th Cir. 1981); see also Brief for Pennsylvania, supra note 29, at 23-26.

97. 711 F.2d 431 (1st Cir. 1983).
for administrative work in a case brought under the Clean Water Act.\textsuperscript{98} The work at issue there took place before the litigation and therefore is technically distinguishable from \textit{Delaware Valley}, \textit{Webb}, and other cases\textsuperscript{99} in that respect. The \textit{Roosevelt Campobello} court, however, did not restrict its holding to prelitigation activities. It broadly held that it saw no basis for awarding fees for any work outside litigation, whether performed before or after the litigation.\textsuperscript{100} In reaching this conclusion, it cited the legislative history of both the Clean Water Act and the Clean Air Act, where the fee award provisions are virtually identical, and found that Congress specifically intended to exclude work in nonjudicial proceedings from compensation.\textsuperscript{101} Thus, although the Supreme Court did not mention \textit{Roosevelt Campobello} in its \textit{Delaware Valley} opinion, the Court's ruling would appear to overrule the First Circuit's decision.

This part of \textit{Delaware Valley} represents a significant step forward in the interpretation of fee award provisions. It will encourage attorneys to take on environmental citizen suits because their work in the inevitable administrative proceedings accompanying such litigation can be compensated. Hence, the decision also promotes the statutory goal of encouraging citizen enforcement of environmental laws.\textsuperscript{102}

The Court's decision is also important because it recognizes that administrative work is as important as lawsuits in enforcing environmental laws. As \textit{Delaware Valley} amply illustrates, participation in administrative proceedings can be crucial to the enforcement of a court's order and to the preservation of the relief won, namely, compliance with environmental laws.\textsuperscript{103}

\textbf{B. Fee Enhancement Because of Superior Work}

\textit{1. The Court's Decision and Reasoning}

The Supreme Court overruled the lower court's use of a multiplier for quality in Phase V. The Court held that "the overall quality of performance ordinarily should not be used to adjust the lodestar."\textsuperscript{104} The Court concluded that the appellate court erred in affirming the increase in fees for superior representation because there was no indication that the quality of work done by \textit{Delaware Valley} counsel was not reflected in

\begin{itemize}
  \item \textsuperscript{98} \textit{Id.} at 442.
  \item \textsuperscript{99} \textit{See supra} note 92.
  \item \textsuperscript{100} 711 F.2d at 942.
  \item \textsuperscript{101} \textit{Id.} at 943.
  \item \textsuperscript{102} \textit{See Miller, supra} note 1, at 10,409.
  \item \textsuperscript{103} As Miller points out, "[t]hat the party opposing the fee award initiated or actively participated in the administrative proceeding may be an indication of how integral that proceeding is to the judicial action," presumably because the opposing party otherwise would not have an interest in participating. \textit{Id.} at 10,419.
  \item \textsuperscript{104} 106 S. Ct. at 3099.
\end{itemize}
the hourly rate used to calculate the lodestar. The Court stated that the "lodestar" is presumptively the reasonable attorney's fee award.

In explaining its holding, the Court traced the history of prior attempts to develop a measure that would meet the vague standard provided in fee award statutes, namely, that the fee award be "reasonable." The Court had rejected the Johnson method because the factors ended up being extremely subjective, granted too much discretion to trial court judges, and hence yielded disparate results. The Third Circuit's lodestar approach was an improvement, but like the Johnson approach, the Court found it unsatisfactory because it also could produce "inconsistent and arbitrary fee awards." The Court claimed to have adopted a hybrid approach in Hensley, combining the Johnson factors and the lodestar. Yet, in Blum the Court held that the lodestar was "presumed" to be the reasonable fee. In that case, the Court also limited the factors that could be considered as grounds for adjustment of the lodestar. Specifically, it eliminated the special skill and experience of counsel, the quality of representation, and the results obtained, because these factors were "presumably fully reflected in the lodestar," and thus to use them for adjustment would constitute double counting. The Court had found that only in "certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts," could the lodestar be adjusted upwards.

Having laid this foundation, the Court found that the record in Delaware Valley did not adequately demonstrate superior quality of work in Phase V. In particular, the Court held that it was inconceivable that the work was "superior" when nearly one-third of all the hours counted in the lodestar for that phase were not compensated at the highest rate the district court awarded. Another indicator that the Court relied on to argue that Delaware Valley counsel's work was not "superior" was the district court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive. Further-

105. Id.
106. Id. at 3098.
108. 106 S. Ct. at 3097. See supra notes 40-41 and accompanying text for an explanation of the Johnson method.
109. See supra notes 33-39 and accompanying text.
110. 106 S. Ct. at 3097.
113. Id. at 898-900.
114. Delaware Valley, 106 S. Ct. at 3099.
116. 106 S. Ct. at 3099.
117. Id. See also supra note 23 for a discussion of the district court's elimination of hours.
more, neither Delaware Valley counsel nor the courts presented specific evidence, as required under *Blum*, to prove that Delaware Valley counsel’s work during that phase of the proceedings was outstanding, nor did they show that the lodestar amount was far below awards in similar cases.

The Court next considered the policy implications of its decision, noting that as long as the purpose of a fee award statute is fulfilled, there is no need to increase the lodestar figure. The Court reasoned that fee awards were not meant “to improve the financial lot of attorneys” or to duplicate private fee arrangements. Rather, their purpose was to enable private parties to secure counsel to redress injuries resulting from actual or threatened violations of the given statute. “Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” There was no need to increase fee awards beyond the lodestar to promote statutory goals.

2. The Dissent

Justices Blackmun and Marshall dissented. They would have set the entire case for reargument, rather than have a “piecemeal adjudication” that left out the issue of contingency multipliers. Having expressed the view that the case should be reheard, the dissent turned to the merits of the case. With Justice Brennan joining, the dissent concurred in the decision to uphold compensation for administrative work. But with respect to the enhancement of fees for quality, the dissent took issue with the Court’s application of *Blum*, arguing that the Court had narrowed the availability of higher awards for “superior” work “to the point where it may be virtually impossible” to meet the requirements necessary to obtain an upward adjustment of fees. The dissent asserted that, contrary to the majority’s finding, the adjustment did in fact meet the standards of *Blum*. Finally, the dissent contended that the majority did not apply the proper “abuse of discretion” standard for the review of fee awards. In their opinion, the district court had not abused its discretion.

120. Id. at 3098-99.
121. Id. at 3098.
122. Id.
123. Id.
124. Id. at 3098-99.
125. Id. at 3100 (Blackmun, J., dissenting).
126. Id.; see supra notes 78-90 and accompanying text.
127. 106 S. Ct. at 3100 (Blackmun, J., dissenting).
128. Id.
in multiplying the lodestar figure for Phase V to reflect superior quality, and therefore that part of the judgment should have been upheld.\textsuperscript{129}

3. Discussion

While the Supreme Court’s decision in \textit{Delaware Valley} is in some ways positive for citizens seeking legal enforcement of environmental statutes, many problems remain. First, the Supreme Court should have upheld the multiplier for quality. This case, if any, would seem to merit its application. Although the Court reiterated that upward adjustments based on quality are permissible in certain circumstances, its decision strongly implies the contrary: in practice, it appears that such upward adjustments rarely will be acceptable. Second, the Court ignored the standard of review that it should have applied in reviewing the fee award. Finally, the opinion leaves unanswered important questions about what exactly are reasonable attorney’s fee awards.

The Court’s conclusion that the quality of work was reflected in the hourly rate used to calculate the lodestar\textsuperscript{130} is curious. The record actually seems to establish that the hourly rates did \textit{not} include considerations of quality. The district court based the rates on “the attorney’s reputation, status and [the] type of activity for which the attorney is seeking compensation.”\textsuperscript{131} An attorney’s reputation and status tend to correlate generally with the quality of that attorney’s work. However, these considerations will not necessarily reflect the quality of the attorney’s work in the case for which the award is given; he or she may have performed work beyond his or her usual caliber. More importantly, in this case the district court noted that once it calculated the lodestar, that figure could then be adjusted for quality.\textsuperscript{132} Thus, the district court focused on the nature of the task, not on the quality of the work involved,\textsuperscript{133} and the lodestar was calculated in anticipation of the application of multipliers.\textsuperscript{134} Therefore, the Court’s fear of the “danger of double counting”\textsuperscript{135} was unjustified in this case.

The Court’s explanation of why quality was included in the lodestar is unsatisfactory. The Court noted that nearly one-third of the hours spent on Phase V were not compensated at the highest hourly rate the

\begin{enumerate}
\item Id.
\item Id. at 3100.
\item \textit{Delaware Valley}, 581 F. Supp. at 1419.
\item Id.
\item Delaware Valley argued that had \textit{Blum} been decided prior to the district court’s determination of attorney’s fees, the court “might have been leery of multipliers for superior work and have figured the fee on the basis of higher rates . . . .” \textit{Id.} at 38-39.
\item \textit{Delaware Valley}, 106 S. Ct. at 3099.
\end{enumerate}
ATTORNEY’S FEES

The district court reserved this rate for the “most difficult” type of work counsel performed. Therefore, the Court said, the quality must not have been superior and hence must have been reflected in the lodestar. In other words, because Delaware Valley counsel spent almost one-third of their time on work that was not very difficult, their work could not have been of superior quality. The Court claimed that this conclusion was reinforced by the Third Circuit, which found that the highest rate awarded by the district court was appropriate given the relative inexperience of the attorneys involved. The Court thus erroneously equated the difficulty of the work with the quality of the work and further implied that an hourly rate commensurate with an attorney’s level of experience somehow embodies the quality of that attorney’s work. The Court’s reasoning reveals two questionable assumptions: that legal work that is not very difficult cannot be of high quality, and that attorneys with equal experience will produce work of equal quality. These assumptions, coupled with the fact that quality was not included in the calculation of the lodestar, point to the inappropriateness of the Court’s holding.

The Court’s conclusion that Delaware Valley failed to meet the requirements of Blum and its predecessor Hensley is also open to question. Blum permits upward adjustments of the lodestar in “some cases of exceptional success.” The quality of representation “may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was ‘exceptional.’” Both the Third Circuit and the dissent found that Delaware Valley met the standards of Blum.

Unlike the record under review in Blum, which the Supreme Court found replete with conclusory statements and devoid of specific evidence, the record in Delaware Valley provides explicit statements of

136. Id.
137. Delaware Valley, 581 F. Supp. at 1422.
138. Delaware Valley, 106 S. Ct. at 3099.
139. Id. The two attorneys who did most of the work in this phase were admitted to the bar in 1977 and 1978, respectively, and thus were inexperienced as of August 1978, when the consent decree was issued. Delaware Valley, 762 F.2d at 279 n.10.
143. Id. at 889.
144. Delaware Valley, 762 F.2d at 281-82.
145. Delaware Valley, 106 S. Ct. at 3100 (Blackmun, J., dissenting).
146. Blum, 465 U.S. at 898.
the reasons why the work was superior and the success exceptional.147 The Court ignored both the district and appellate courts' rationales for finding the work outstanding. The Court did not even mention perhaps the most difficult aspect of the postdecree proceedings: the conflict between the Pennsylvania state court and legislative systems and the federal court system. This conflict made the case highly unusual.148 The resolution of this conflict, according to the district court, was attributable in large part to the "outstanding" work by Delaware Valley counsel.149 The counsel's work also assisted the district court in overcoming Pennsylvania's recalcitrance, and it helped the court avoid "undue interference with essential elements of state sovereignty" when it ordered Pennsylvania to ignore a state legislative mandate.150 The Supreme Court instead focused on the district court's admittedly confusing elimination of hours and subsequent application of a multiplier for quality to the same phase.151

The majority's finding that the record in Delaware Valley fell short of the Blum standard raises the question of how the Blum standard could ever be reached. Had the district court in Delaware Valley known how the Supreme Court would construe its actions, perhaps it either would not have eliminated so many hours or else would have awarded a higher hourly rate to account for the superior quality.152 In any event, as the dissent pointed out, to meet the standard of Blum as interpreted in Delaware Valley—a rare case, exceptional success, and evidence in the record sufficient to sustain a multiplier for quality—may be virtually impossible.153 As a result, one is left wondering if there is any set of facts that would sustain an upward adjustment of fee awards.

The most troubling aspect of the majority's opinion is its failure to discuss the role of judicial discretion in determining fee awards. The opinion does not even mention the standard of review, although the dissent notes its absence.154 This omission is surprising in several respects. Section 304(d) of the Clean Air Act expressly gives trial courts discretion to decide the fee award,155 and the usual standard of review for an award of attorney's fees is abuse of discretion.156

147. See Delaware Valley, 581 F. Supp. at 1419; 762 F.2d at 281-82; see also supra notes 53 & 66-69 and accompanying text.
149. Id.
150. Id.
151. Delaware Valley, 106 S. Ct. at 3099.
152. Brief for Delaware Valley, supra note 133, at 38.
153. Delaware Valley, 106 S. Ct. at 3100 (Blackmun, J., dissenting); see also Miller, supra note 1, at 10,421 (commenting that the Court's reasoning in Blum "casts doubt" on whether adjustments for quality of representation "could be justified under any circumstances").
154. Delaware Valley, 106 S. Ct. at 3100 (Blackmun, J., dissenting).
155. See supra note 10 for the relevant text of the statute.
156. See, e.g., Williams v. Butler, 746 F.2d 431 (8th Cir. 1984) (award of attorney's fees
Although “abuse of discretion” has no precise definition, standard articulations of the term typically include “when the action of the trial judge is clearly contrary to reason,”157 when the decision is “clearly erroneous,”158 and when the reviewing court has a “definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the evidence.”159 The Third Circuit summed up the standard by stating, “[i]f the district court has applied the correct criteria to the facts of this case, then, it is fair to say we will defer to its exercise of discretion.”160 The Third Circuit, reviewing Delaware Valley, explicitly applied the “clearly erroneous” standard161 when it found that the district court had not abused its discretion in determining the fee award and multipliers.162

The Supreme Court usually endorses this standard of review and has applied it in reviewing fee award cases prior to Delaware Valley.163 In Hensley, the Court stated: “We reemphasize that the district court has discretion in determining the amount of a fee award.”164 The only
limitation that the Court has put on the district courts' discretion is that it "must be exercised in light of the considerations we have identified," referring to the limited number of factors that may be used to adjust the lodestar.\textsuperscript{165} Thus in Blum, the case relied on most by the Court in rejecting the multiplier for quality, the Court held that the district court had abused its discretion in adjusting the fee award for quality because the court had not substantiated its assertion that the work was superior.\textsuperscript{166}

The rationale for this standard of review is that appellate courts do not have the same firsthand experience with the parties and their counsel that trial courts have. The trial court is the forum most familiar with the proceedings, and it is therefore better able to evaluate the claims before it.\textsuperscript{167} In Blum, the Supreme Court acknowledged the privileged role of the district court, which was in the "best position to determine whether the quality of representation was high."\textsuperscript{168}

This rationale, that the district court is best able to assess the quality of an attorney's work, applies with particular force to Delaware Valley. The litigation and related proceedings lasted nine years, during which time the district court was closely involved with the parties.\textsuperscript{169} The appellate court cited the district court's longstanding involvement and familiarity with the case in its decision to respect the district court's discretion.\textsuperscript{170} Inexplicably, the Court ignored this relationship. The dissenters in Delaware Valley implied that if the majority had considered the familiarity factor it would have decided the issue differently.\textsuperscript{171} Perhaps the majority avoided the question of the proper standard of review in order to reach the finding it did.

The Court's failure to mention the standard of review is surprising in light of its earlier reliance\textsuperscript{172} on the abuse of discretion standard enunciated in Justice Brennan's concurring opinion in Hensley.\textsuperscript{173} Justice Brennan proposed that "[i]f a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high

\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Blum, 465 U.S. at 896-99.
\item \textsuperscript{167} See, e.g., Harmon v. San Diego County, 736 F.2d 1329, 1331 (9th Cir. 1984).
\item \textsuperscript{168} Blum, 465 U.S. at 899; accord Hensley, 461 U.S. at 437 (the abuse of discretion standard "is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters").
\item \textsuperscript{169} See supra note 18.
\item \textsuperscript{170} Delaware Valley, 762 F.2d at 279.
\item \textsuperscript{171} Delaware Valley, 106 S. Ct. at 3100 (Blackmun, J., dissenting).
\item \textsuperscript{172} See supra notes 89-90 and accompanying text.
\item \textsuperscript{173} 461 U.S. at 455 (Brennan, J., concurring). This case was brought under 42 U.S.C. § 1983 (1982).
\end{itemize}
as to constitute an unmistakable windfall."174 The Court implicitly adopted this standard in its discussion of whether attorney's fees may be awarded for work in administrative proceedings.175 Yet it inexplicably failed to apply the same standard to the use of multipliers. If the dissent is correct that the Court would have affirmed the multipliers had it applied the proper standard of review,176 the fact that the majority avoided this issue suggests that it wanted to use this case to limit—if not virtually eliminate—the application of multipliers to fee awards.

The Court's comment that the purpose of the fee award provision was satisfied because it was possible for Delaware Valley to hire attorneys reduces an important issue to an ex post facto argument. Obviously, the provision enabled Delaware Valley to obtain counsel because it was before the Court. That fact, however, says nothing about other potential plaintiffs in suits such as this one.

By severely limiting the use of a multiplier for quality, the Court has weakened the effectiveness of fee award statutes in achieving their goals. The fee award provision in the Clean Air Act has two major purposes: to discourage frivolous litigation and to encourage litigation that would aid implementation of the objectives of the Act.177 For all practical purposes, a "reasonable fee" after Delaware Valley is simply the number of hours multiplied by a reasonable rate, that is, the unadjusted lodestar. Thus, the crucial question is whether the Court's ruling provides sufficient incentive to encourage such litigation.178 It does provide an incentive to the extent that it guarantees some remuneration to attorneys who undertake legitimate (and successful) public interest environmental litigation. But whether the amount of money involved is sufficient to encourage more experienced attorneys to bring suit is another matter. The $100 hourly rate awarded to Delaware Valley counsel for the "most difficult" work they performed,179 for example, was not on its face a paltry sum. It is a much lower hourly rate, however, than that received by environmental lawyers in private practice in major metropolitan areas.180

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174. Hensley, 461 U.S. at 455. Justice Brennan asserted that a more detailed review of attorney's fee awards would frustrate rather than advance the statutory intent. Id.

175. See supra notes 89-90 and accompanying text.

176. Delaware Valley, 106 S. Ct. at 3100 (Blackmun, J., dissenting).

177. The House report on the Clean Air Act stated that "the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H.R. REP. NO. 294, 95th Cong., 1st Sess. 337 (1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1416; see also Fadil, supra note 6; Comment, Who Pays for Litigation, supra note 6; Note, Awards of Attorney's Fees, supra note 6.

178. For a cogent negative response, see Note, Award of Attorney's Fees, supra note 6, at 691.


180. Miller, supra note 1, at 10,423. Miller also notes that fees awarded in environmental suits generally "have not approached awards in antitrust or securities cases, either in the hourly rates allowed or the amounts of awards made." Id. at 10,422.
Associates may have difficulty obtaining permission to pursue public interest claims unless the firm can expect to recover at least some of its costs. The frequent need for attorneys with technical expertise in environmental matters exacerbates this problem. Unless enough money is available to attract experienced, top-level attorneys who have the resources and skills to tackle legally and politically complex litigation, such cases may not be pursued. In this way, the Court may have undermined the goals of the statute.

The Court failed to set down a consistent standard for attorney's fee awards. The Court said that the lodestar figure is presumptively reasonable, and thus seemed to say that the lodestar is the reasonable attorney's fee. Yet the Court provided only vague guidelines as to how to arrive at the two figures comprising the lodestar. The Court's reasoning and its account of the history of fee award decisions do not clarify the issue. In *Hensley*, the Court noted that many of the *Johnson* factors "are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." But the Court did not explain, either in *Hensley* or in *Delaware Valley*, how these factors are subsumed. The Court implied that these factors, such as the skill required to perform legal services and the undesirability of the case, exist by definition in the hourly rate. However, its failure to explicitly state this leaves the issue murky. Does the prevailing market rate take account of these factors automatically? Could a court apply a higher or lower rate to reflect these factors? Indeed, the subjectivity of which the Court complained may have been transferred to an earlier phase of the fee award determination. The hourly rate could be deemed "subjective" if it is based on considerations of quality, for example, rather than just on the market rate.

The uncertainty created by *Delaware Valley* also may serve to discourage suits in the long run. Although this decision itself does not represent a drastic curtailment of fee awards, it does suggest that courts will be more tethered to the lodestar than they were previously. If a court thinks that a prevailing party's work was especially good, the Supreme Court has given no clear guidance as to how the court can factor this consideration into an award. Given this lack of clarity, it is reasonable to assume that more litigation on the subject will follow. Challenges to fee awards may, on the whole, discourage suits under fee statutes and as a result defeat the purpose of such provisions.185

182. See supra note 41.
184. *Delaware Valley*, 106 S. Ct. at 3097; see supra text accompanying note 108.
185. See *Hensley*, 461 U.S. at 455-56 (Brennan, J., concurring). Justice Brennan's concur- rence asserted that fee awards should not be easily overturned. He feared that excessive litiga- tion over fees would result, diverting time and effort away from substantive issues. "The more obstacles that are placed in the path of parties who have won significant relief and then seek
CONCLUSION

Delaware Valley further defines the scope of statutory attorney's fees. By allowing fees for postlitigation activities necessary to protect relief won in court, the Court clarifies and expands the category of compensable work. Yet, by denying an upward adjustment of the fees awarded in this case, the Court appears to limit the amount of attorney's fees that may be awarded.

The main contribution of the case is to settle that fees are appropriate for work in nonjudicial proceedings after litigation. The liberal reading of the legislative history of attorney's fees statutes suggests that the Court will continue to take an expansive view of what work is compensable. It also recognizes that nonlitigation work plays a crucial role in enforcing statutes such as the Clean Air Act. The decision thus will encourage suits that otherwise might not have been brought under this and similar statutes because of the extensive nonlitigation work involved.

Although the Court sets a clear precedent expanding the range of work for which fees may be awarded, its message about how to calculate fees is less clear. The proposition that the lodestar formula reflects the quality of the work performed seems simple enough on its face, but the majority fails to explain how courts should figure quality and other factors into the lodestar. Does the Court mean that quality cannot be a separate factor because a reasonable hourly rate will reflect quality of work, or does it mean that the reasonable hourly rate should be increased when the quality of an attorney's work is exceptional? Rather than providing clear answers, the decision raises troubling questions.

An equally disturbing aspect of the decision is that the Court further restricts the application of multipliers by striking down the quality multiplier in this case. Given the unique facts of the case, the district court's use of multipliers in Delaware Valley seems to be well within the bounds of discretion defined by even the most restrictive reading of the Supreme Court's test. Thus, the Court's rejection of multipliers in this instance implies that they will never be appropriate. Whether this part of the decision will substantially restrict fee awards is uncertain. The decision, nonetheless, will discourage some suits.\(^{186}\) And any restriction of such suits will frustrate the congressional goals behind these provisions and, more importantly, weaken the enforcement of environmental statutes.

reasonable attorney’s fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases.” Id. The same reasoning would seem to apply to environmental statutes.

186. Fadil, supra note 6, commenting on the relative dearth of citizen suit litigation, argues that although the expense and difficulty involved in the recovery of attorney’s fees is a factor in explaining this dearth, it is not a significant factor. Id. at 55.