SUPREME COURT OF THE UNITED STATES

No. 91–810

CITY OF BURLINGTON, PETITIONER *v.* ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 24, 1992]

JUSTICE O'CONNOR, dissenting.

I continue to be of the view that in certain circumstances a "reasonable" attorney's fee should not be computed by the purely retrospective lodestar figure, but also must incorporate a reasonable incentive to an attorney contemplating whether or not to take a case in the first place. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air,* 483 U. S. 711, 731–734 (1987) (*Delaware Valley II*) (O'CONNOR, J., concurring in part and concurring in judgment). As JUSTICE BLACKMUN cogently explains, when an attorney must choose between two cases—one with a client who will pay the attorney's fees win or lose and the other who can only promise the statutory compensation if the case is successful—the attorney will choose the fee-paying client, unless the contingency-client can promise an enhancement of sufficient magnitude to justify the extra risk of nonpayment. *Ante*, at 2–3. Thus, a reasonable fee should be one that would "attract competent counsel," *Delaware Valley II, supra,* at 733 (O'CONNOR, J., concurring in part and concurring in judgment), and in some markets this must include the assurance of a contingency enhancement if the plaintiff should prevail. I therefore dissent from the Court's holding that a "reasonable" attorney's fee can never include an enhancement for cases taken on contingency.

In my view the promised enhancement should be "based on the difference in market treatment of contingent fee cases as a class, rather than on an

assessment of the `riskiness' of any particular case." *Id.*, at 731 (emphasis omitted). As JUSTICE BLACKMUN has shown, the Court's reasons for rejecting a market-based approach do not stand up to scrutiny. *Ante*, at 8. Admittedly, the courts called upon to determine the enhancements appropriate for various markets would be required to make economic calculations based on less-than-perfect data. Yet that is also the case, for example, in inverse condemnation and antitrust cases, and the Court has never suggested that the difficulty of the task or possible inexactitude of the result justifies forgoing those calculations altogether. As JUSTICE BLACKMUN notes, these initial hurdles would be overcome as the enhancements appropriate to various markets became settled in the district courts and courts of appeals. *Ante*, at 7.

In this case, the District Court determined that a 25% contingency enhancement was appropriate by reliance on the likelihood of success in the individual case. App. to Pet. for Cert. 132–133. The Court of Appeals affirmed on the basis of its holding in *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F. 2d 295 (CA2 1987), which asks simply whether, without the possibility of a fee enhancement, the prevailing party would not have been able to obtain competent counsel. 935 F. 2d 1343, 1360 (CA2 1991) (citing *Friends of the Earth*, *supra*). Although I believe that inquiry is part of the contingency enhancement determination, see *Delaware Valley II, supra,* at 733 (O'CONNOR, J., concurring in part and concurring in judgment), I also believe that it was error to base the degree of enhancement on case-specific factors. Because I can find no market-specific support for the 25% enhancement figure in the affidavits submitted by respondents in support of the fee request, I would vacate the judgment affirming the fee award and remand for a market-based assessment of a suitable enhancement for contingency.