

WALLOWING IN AMBIGUITY: ATTORNEY’S FEE ENHANCEMENT,  
PUNITIVE DAMAGES, AND DUE PROCESS UNDER FEDERAL AND STATE  
LAW

Cody Salgado Chapple\*

“How will I get paid?” Perhaps the sole question on a lawyer’s mind after a favorable judgment. In a typical case, an attorney’s fees are known and prearranged with a client, but in many cases the answer is uncertain. For employment or civil rights attorneys taking on indigent clients, fees may be paid for by the opposing party through fee-shifting statutes. Fee-shifting statutes play an important role in America’s legal system because they provide well-trained civil rights attorneys the funding necessary to defend the constitutional rights of individuals that could otherwise not afford representation. The basis for awarding fees, however, is obscure—consider the following scenario:

The trial ended, and the plaintiff successfully litigated a wrongful termination claim against his former employer, a large chicken processing plant. The claim was litigated under diversity jurisdiction in federal district court under a cause of action from a Texas employee-protection statute. But the dust has not yet settled over the courtroom; there is still the matter on everyone’s mind—fees. The plaintiff filed a motion for attorneys’ fees, and the defendant responded. After reviewing the Texas statute, the defendant learned that attorneys’ fees in Texas are calculated by considering eight factors, and the possibility of enhancement—a judicial increase of fees for outstanding performance—is narrowly applied in Texas. This research left the defendant at ease that the court will determine reasonable and fair fees.

An order is filed, and the court granted the award of fees—and more. In fact, familiar with federal fee-shifting statutes, the court applied federal—not Texas—lodestar considerations by citing similar district court cases. On top of this, the court enhanced the award by a factor of three because of the defendant’s poor reputation as an employer, and because of the attorney’s exceptionally theatrical performance during trial.

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This scenario poses several questions; Why did the court not consider the differences between federal and state authority? Does enhancement create unexpected and punitive results? Is the justification used to award the lodestar outdated under prior Supreme Court cases? Attorneys' fee awards similar to this scenario occur with little thought to the aforementioned questions. Courts and litigators face ambiguities when applying attorneys' fees, and this uncertain application results in poor guidance to parties, courts, and attorneys.

Current methods for awarding and enhancing attorneys' fees are inconsistent and confusing. There is no uniform or standard approach for determining reasonable fees; federal and state case laws differ, and some courts do not rigorously follow the Supreme Court's fee determining procedure. Due process is also implicated for the losing party and fee awards may create constitutional issues. This article discusses the differences between state and federal fee-shifting statutes, enhancement procedures, potential due process concerns to enhancement awards, and puts forth a comprehensive framework that seeks to outline and understand the mire of ambiguity that is attorneys' fee law.

## I. INTRODUCTION

A consequence of fee-shifting statutes within the context of the American Rule is that awarding reasonable attorneys' fees has a punitive effect upon the losing party. This punitive effect is magnified when a court determines a fee amount is not reasonable and corrects this by enhancing the award until the fee is considered reasonable in the eyes of the court. Currently, trial judges may adjust attorneys' fees up or down for the prevailing party under "extraordinary" or "rare" circumstances, but this process and its limitations are unclear.

Enhancing the lodestar, the term used to describe the amount in reasonable attorneys' fees,<sup>1</sup> without proper constraints, may violate the losing party's constitutional right of due process. Similar to constraints that limit exemplary damages, enhancing attorneys' fees may violate due process because: (1) the lodestar figure is presumptively reasonable—therefore modifiers may necessarily create unreasonable fees; (2) the factors used to assess fees are redundant or superfluous to the factors already subsumed within the lodestar; (3) the enhancement percentage is sometimes arbitrarily

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<sup>1</sup>Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973).

arrived at by judges without support by reasonable, objective evidence;<sup>2</sup> and (4) the losing party is not put on notice of the expected amount brought on by additional fees until a motion seeking enhancement is filed once judgment is rendered.<sup>3</sup>

The Supreme Court established limitations on how and when courts may enhance the lodestar in *Perdue v. Winn*.<sup>4</sup> Despite the guidance by the *Perdue* Court, lower courts continue to apply a multi-factored test to calculate the lodestar. Additionally, *Perdue* did not distinguish between federal fee-shifting statutes and state fee-shifting statutes. The absence of this discussion resulted in courts choosing to ignore the *Perdue* limitations in diversity cases that apply state enhancement standards.

Courts also reconsider the multiple factors already subsumed within the lodestar to justify enhancement under certain circumstances—a practice the Supreme Court specifically held as impermissible.<sup>5</sup> District courts, however, seem to return to the same factors in diversity cases to determine both the amount of reasonable fees and enhancement of the fees despite the guidance from the Supreme Court. This confusion over how to calculate the lodestar and when to apply enhancement creates a muddled framework with no single and clear procedural standard.

This article analyzes: (1) the different methods for calculating the lodestar; (2) the history of enhancement; (3) the Supreme Court's decision in *Perdue*; (4) how courts have interpreted *Perdue*; (5) potential due process violations of enhancement; and (6) the need to clarify fee enhancement procedure to satisfy *Perdue* and due process.

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<sup>2</sup>See, e.g., *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 557 (2010) (stating that a 75% enhancement was essentially arbitrary when unsupported by evidence); *Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n*, 590 F. App'x 597, 604 (6th Cir. 2014) (holding that a downward adjustment was proper, but the magnitude of the district court's 85% reduction was unsupported by the record and an abuse of discretion); *Gray ex rel. Alexander v. Bostic*, 613 F.3d 1035, 1045 (11th Cir. 2010) (reversing an enhancement of 15% to attorneys' fees because although the district court justified the enhancement by noting that "prevailing market rates . . . do not reflect inflation," the court did not explain its rationale further nor point to evidence on the record that indicated a difference between rising fees and inflation over five years).

<sup>3</sup>See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

<sup>4</sup>*Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

<sup>5</sup>*Id.* at 553 (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726–27 (1986)); see also *Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 492 (Tex. 2019).

## II. ATTORNEYS' FEES AND THE LODESTAR

Under the English Rule of litigation, practiced by England and most western countries, the losing party to a lawsuit pays the winner's attorneys' fees.<sup>6</sup> In the United States, however, the general rule is the American Rule.<sup>7</sup> Under the American Rule, each party bears their own attorneys' fees regardless of the outcome of litigation unless there is an express exception.<sup>8</sup> In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court carved out two exceptions to the American Rule: (1) when a contract executed by the litigating parties specifies the way in which attorneys' fees will be paid and (2) through fee-shifting statutes.<sup>9</sup> As a result of the American Rule, Congress and state legislatures have created numerous fee-shifting statutes that apply to a wide range of litigation categories.

Federal fee-shifting statutes exist for environmental,<sup>10</sup> patent,<sup>11</sup> securities,<sup>12</sup> wage and hour claims,<sup>13</sup> and bankruptcy<sup>14</sup> causes of action. The most commonly used is perhaps the civil rights statute 42 U.S.C. § 1988, which allows the prevailing party in certain job discrimination and public accommodation claims the ability to recover reasonable attorneys' fees from the losing party.<sup>15</sup> States also create fee-shifting statutes, often mirroring federal causes of action. One general category covers employment discrimination and consumer litigation, such as the Texas Deceptive Practices Consumer Protection Act.<sup>16</sup>

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<sup>6</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

<sup>7</sup> *Id.*; *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 253 (2010); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

<sup>8</sup> *Hensley*, 461 U.S. at 429.

<sup>9</sup> 421 U.S. at 257.

<sup>10</sup> 42 U.S.C.A. § 7604 (1990) (permitting a court to award the cost of litigation to any party, if the court determines the award appropriate in an emission standard violation claim).

<sup>11</sup> 35 U.S.C.A. § 285 (1952) (permitting a court to award reasonable fees in exceptional cases).

<sup>12</sup> 15 U.S.C.A. § 77k(e) (1998) (permitting a court to award reasonable attorneys' fees, if the court believes the suit or defense to have been without merit).

<sup>13</sup> 29 U.S.C.A. § 216 (2018) (requiring that courts award reasonable attorneys' fees, to be paid by the defendants when judgment is awarded to the plaintiff).

<sup>14</sup> 11 U.S.C.A. § 330 (2005) (permitting courts to allow reasonable compensation to the debtor's attorney).

<sup>15</sup> 42 U.S.C.A. § 1988(b) (2000).

<sup>16</sup> *E.g.*, TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2011).

Parties in their contracts and drafters of fee-shifting statutes often leave the calculation of the fee amount to what is “reasonable and necessary.”<sup>17</sup> This language is designed to limit the amount in fees and is a question of fact to be determined by the factfinder.<sup>18</sup> In practice, however, the “reasonable and necessary” language creates numerous disputes over the precise meaning of those words—what is reasonable and necessary to a defendant seldom aligns with a plaintiff’s definition. Some statutes, such as the Patent Act’s fee-shifting provision, add additional requirements by including “exceptional” language.<sup>19</sup> Courts interpret “exceptional” to mean a case that stands out from other similar patent cases concerning the substantive strength of a party’s position.<sup>20</sup> Because of loose phrasing and guidance, the definition of what is a reasonable and necessary fee comes from the courts.

Courts have captured the determining factors of reasonable and necessary fees in the “lodestar,” which has become the guiding light for fee-shifting jurisprudence.<sup>21</sup> What constitutes a reasonable fee, however, has been the subject of constant litigation. The lodestar figure was created by courts to describe the product of the number of hours worked by the prevailing hourly rate.<sup>22</sup> The term “lodestar” was first coined by the Third Circuit to describe the essence of what constitutes reasonable compensation to the prevailing party and quickly spread in subsequent opinions.<sup>23</sup> The term’s meaning has since shifted from a metaphor to an established legal term that describes the reasonable attorneys’ fee amount based on time expended and hourly fee.<sup>24</sup>

This ostensibly simple formula has been tweaked to include more factors that contribute to supporting the fee amount. Courts went further by permitting an enhancement—a multiplication of the lodestar—to increase or decrease the award.

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<sup>17</sup> *Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 488–89 (Tex. 2019).

<sup>18</sup> *Id.* at 489.

<sup>19</sup> 35 U.S.C.A. § 285 (1952).

<sup>20</sup> *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014).

<sup>21</sup> *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

<sup>22</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

<sup>23</sup> *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); see also *Derivation of the Use of “Lodestar”—A Strange Term Still Used. But With a Murky Future.*, CALIFORNIA ATTORNEY’S FEES (June 7, 2008, 5:19 PM), <https://www.calattorneysfees.com/2008/06/derivation-of-t.html> (discussing *Lindy Bros. Builders*).

<sup>24</sup> See *Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany*, 484 F.3d 162, 169 (2d Cir. 2007).

### A. *Methods of Calculating the Lodestar*

Whether to enhance the lodestar and by what factors depends on which method is used to calculate the lodestar in the first place. The two predominant methods for calculating the lodestar are: (1) the *Johnson* factors method<sup>25</sup> and (2) the hourly rate method.<sup>26</sup>

The first lodestar method was developed in *Johnson v. Georgia Highway Express, Inc.*<sup>27</sup> The *Johnson* factors method incorporates several factors that set the hourly fee and includes most, if not all, of the relevant factors that constitute a reasonable attorneys' fee.<sup>28</sup> These factors have come to be known as the "*Johnson* factors" in certain circuit jurisdictions, including Texas.<sup>29</sup> The *Johnson* factors are:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) 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 attorneys;
- (10) the undesirability of the case;
- (11) the nature and length of the professional relationship with the client;
- (12) awards in similar cases.<sup>30</sup>

The *Johnson* factors are based on an older version of the American Bar Association's Code of Professional Responsibility and followed by courts as a way to justify arriving at a reasonable fee.<sup>31</sup> Now, courts often look to the *Johnson* factors to support the lodestar calculation and award reasonable

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<sup>25</sup> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

<sup>26</sup> *Lindy Bros. Builders*, 487 F.2d at 167.

<sup>27</sup> 488 F.2d at 717–19.

<sup>28</sup> *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

<sup>29</sup> *Johnson*, 488 F.2d at 717–19; *see also Pennsylvania*, 478 U.S. at 565.

<sup>30</sup> 488 F.2d at 717–19.

<sup>31</sup> *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327, 332 (11th Cir. 1982); *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 884 (8th Cir. 1977); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

attorneys' fees.<sup>32</sup> Although primarily subjective, the *Johnson* factors method creates a strong presumption that the lodestar figure is sufficiently reasonable.<sup>33</sup>

The hourly rate method was first articulated by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*<sup>34</sup> The more simple hourly rate method, recognized by the Supreme Court in *Hensley v. Eckerhart*, determines a reasonable attorneys' fee by the number of hours expended on the litigation multiplied by a reasonable rate.<sup>35</sup> Ostensibly, the hourly rate is easier to apply and more objective than the *Johnson* factors, however, how the rate and time components are defined was initially unclear. The Supreme Court, in *Blum v. Stenson*, reaffirmed *Hensley* and further defined the hourly rate as based on the market rate within the relevant legal community.<sup>36</sup> The number of hours claimed is determined when the party seeking attorneys' fees meets its burden of proving the number of hours worked on the case.<sup>37</sup> The limitation inquiry is whether the hours worked are reasonable.<sup>38</sup>

The Supreme Court established its preference for the hourly rate method over the *Johnson* factors in *Perdue v. Winn*.<sup>39</sup> The *Perdue* Court explained that the hourly rate is preferable because it is more "objective" than the *Johnson* factors and thus permits meaningful appellate review.<sup>40</sup> Courts and practitioners, however, still confuse and conflate these two methods.<sup>41</sup> One area of confusion involves adjusting or enhancing the lodestar and the factors used by courts to justify enhancing an otherwise reasonable fee.

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<sup>32</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550–51 (2010).

<sup>33</sup> *Id.*

<sup>34</sup> *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167–68 (3d Cir. 1973).

<sup>35</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

<sup>36</sup> *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

<sup>37</sup> *Hensley*, 461 U.S. at 437.

<sup>38</sup> *See id.* at 433.

<sup>39</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

<sup>40</sup> *Id.* at 552.

<sup>41</sup> *Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 493 (Tex. 2019).

### *B. Adjustments to the Lodestar*

Courts deem the lodestar figure to be presumptively reasonable.<sup>42</sup> Despite this presumption, the Supreme Court, in *Blum*, rejected the argument that an enhancement to the lodestar is never appropriate, stating that enhancement is appropriate when the lodestar does not reflect the “quality of representation” performed by the attorney.<sup>43</sup> Enhancement of the lodestar is therefore acceptable if that presumption is overcome by other factors, but should not include factors already subsumed in the lodestar calculations under certain circumstances.<sup>44</sup> This method of enhancement should only be permitted when necessary and should not be based on a factor subsumed in the lodestar calculation to avoid double counting factors.<sup>45</sup>

Ultimately, the Supreme Court adopted the hourly rate method in *Hensley* and *Blum*, which replaced the practice of considering the twelve *Johnson* factors.<sup>46</sup> The Court’s rationale was reiterated in *Perdue*, where the Court explained that the *Johnson* factors “gave very little actual guidance to district courts” due to “reference to a series of sometimes subjective factors.”<sup>47</sup> By adopting the hourly rate method, however, district courts can pull from the *Johnson* factors to support an enhancement without using factors subsumed within the lodestar because those methods are different.<sup>48</sup> This seems to defeat the purpose of adopting an hourly rate method altogether as it is easier for appellate courts to review than the twelve *Johnson* factors and thus preferable.<sup>49</sup>

Despite this change, the *Johnson* factors continue to be invoked by district courts to calculate the hourly rate for awarding reasonable attorneys’ fees and enhancement when considering state causes of action.<sup>50</sup> Under state fee-shifting statutes, courts look to state law to determine whether to enhance the lodestar amount, and frequently support enhancement under the *Johnson*

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<sup>42</sup> *Perdue*, 559 U.S. at 552.

<sup>43</sup> *Blum v. Stenson*, 465 U.S. 886, 901 (1984).

<sup>44</sup> *Perdue*, 559 U.S. at 554.

<sup>45</sup> *See id.* at 553.

<sup>46</sup> *Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

<sup>47</sup> 559 U.S. at 551 (quoting *Pennsylvania v. Delaware Valley Citizens’ Council Clean Air*, 478 U.S. 546, 563 (1986), *supplemented by* 483 U.S. 711 (1987)).

<sup>48</sup> *Id.* at 554.

<sup>49</sup> *Id.* at 551–52.

<sup>50</sup> *See, e.g.*, *Wells Fargo Bank, Nat’l Ass’n v. 2R, Inc.*, No. 2:16-cv-779-MHT-GMB, 2017 WL 2857713, at \*5 (N.D. Ala., May 11, 2017); *SE Prop. Holdings, LLC v. 145 LLC*, No. 10-00521-KD-B, 2012 WL 6681784, at \*1–2 (S.D. Ala., Dec. 21, 2012).



factors.<sup>51</sup> Under this approach, Texas district courts consider enhancement based on the novelty of litigation,<sup>52</sup> whether the fee agreement between the party and attorney is contingent-fee based,<sup>53</sup> and whether the results obtained by the prevailing party were extraordinary.<sup>54</sup> This approach is subjective and undermines the goal of making appellate review easier.<sup>55</sup> These three factors are typically already subsumed within the lodestar calculation, such as whether the fee arrangement between the attorney and party is contingent in nature.<sup>56</sup>

### III. *PERDUE V. WINN* AND THE NEW LIMITATIONS ON ATTORNEYS' FEE ENHANCEMENTS

Since the Supreme Court's holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, federal courts are not permitted to award attorneys' fees absent an express fee-shifting statute enacted by Congress.<sup>57</sup> One of the most litigated and important fee-shifting statutes was enacted shortly after *Alyeska*—the Civil Rights Attorney's Fees Award Act of 1976.<sup>58</sup> The Act amended 42 U.S.C. § 1988 to allow “the prevailing party, other than the United States, a reasonable attorney's fee” in any actions or proceedings under Sections 1981, 1982, 1983, 1985, and 1986 of the Civil Rights Act.<sup>59</sup> The lodestar concept and enhancement were employed to define the amorphous phrase created by Congress—“reasonable attorney's fee.”

The Supreme Court in 2010 confronted the issue of whether enhancement to the lodestar is reasonable when calculating attorneys' fees in *Perdue v. Winn*.<sup>60</sup> In *Perdue*, the plaintiffs filed a class action on behalf of 3,000 foster-care children against various Georgia state officials, claiming deficiencies in the Georgia foster-care system.<sup>61</sup> The parties resolved all issues in mediation,

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<sup>51</sup> See, e.g., *City of San Antonio v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 U.S. Dist. LEXIS 58384, at \*41–42 (W.D. Tex. Apr. 17, 2017).

<sup>52</sup> *Id.* at \*41.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*45; *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001).

<sup>55</sup> *Hotels.com, L.P.*, 2017 U.S. Dist. LEXIS 58384, at \*42.

<sup>56</sup> *Id.* at \*42–43.

<sup>57</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975).

<sup>58</sup> The Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 264.

<sup>59</sup> 42 U.S.C. § 1988 (2000).

<sup>60</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

<sup>61</sup> *Id.* at 547.

except for the fees that the plaintiffs, as the prevailing parties, were entitled to under 42 U.S.C. § 1988.<sup>62</sup>

The district court held the lodestar amount of \$6 million was “fair and reasonable” based on the attorneys’ billable hours, travel expenses, and reasonable hourly rates for attorneys in “the relevant legal community.”<sup>63</sup> That trial court went on to determine that the results obtained by the plaintiffs’ attorneys were “extraordinary,” stating: “After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.”<sup>64</sup> The district court then enhanced the lodestar amount by 75%, adding approximately \$4.5 million to the plaintiffs’ fees.<sup>65</sup> The district court justified the adjustment due to: (1) the fact that the plaintiffs’ attorneys paid the case expenses and fees of \$1.7 million upfront without reimbursement; (2) counsel was not paid on an ongoing basis while the work was being performed;<sup>66</sup> and (3) the fact that counsel’s ability to recover was contingent on the outcome of the case.<sup>67</sup> The award consisted of the lodestar, enhancement amount, and expenses, totaling \$11,262,363.75.<sup>68</sup>

On certiorari, the Supreme Court rejected the district court’s three justifications for adjusting the enhancement and stated that the 75% enhancement was “essentially arbitrary.”<sup>69</sup> The Supreme Court, however, did not eliminate the ability to adjust the lodestar and concluded that the lodestar may be enhanced in “‘rare’ and ‘exceptional’” circumstances.<sup>70</sup> The Court laid out three instances where an upward adjustment of the lodestar is appropriate.<sup>71</sup> In other words, these are situations where the strong presumption that the lodestar is reasonable is overcome by specific facts in the case. Therefore, the adjustment turns an unreasonable fee amount into a reasonable one through the mechanism of enhancement.

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<sup>62</sup> *Id.*

<sup>63</sup> *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1285 (N.D. Ga. 2006), *aff’d*, 532 F.3d 1209 (11th Cir. 2008).

<sup>64</sup> *Id.* at 1290.

<sup>65</sup> *Id.*

<sup>66</sup> Another way of saying a contingent fee agreement.

<sup>67</sup> *Perdue*, 454 F. Supp. 2d at 1288.

<sup>68</sup> *Id.* at 1296.

<sup>69</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 557 (2010).

<sup>70</sup> *Id.* at 554 (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

<sup>71</sup> *Id.* at 554–56.

The three situations described by Justice Alito where the lodestar is appropriate are when: (1) the method for determining the hourly rate during the lodestar calculation is an inadequate measure of the attorney's true market value; (2) there is an extraordinary outlay of expenses borne by the attorney and litigation is exceptionally protracted; and (3) extraordinary circumstances result in an exceptional delay to the payment of fees to the attorney.<sup>72</sup>

#### A. Market Rate as an Inadequate Measure

The starting point for a lodestar calculation is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.<sup>73</sup> The reasonable hourly rate is calculated by reference to the prevailing market rate for attorney services in the relevant community.<sup>74</sup> Therefore, a reasonable rate in Los Angeles, California, is different from one in Waco, Texas. The Supreme Court in *Blum v. Stenson* explained that an attorney's special skill and experience should already be reflected in the reasonableness of the hourly rates.<sup>75</sup> It was, therefore, odd that the Supreme Court in *Perdue* permitted enhancing the lodestar by the attorney's skill and ability.<sup>76</sup>

The distinction between an otherwise superfluous factor is that the skill is demonstrated during litigation and not captured by an objective criterion alone.<sup>77</sup> In other words, the specific attorney must demonstrate an ability and skill at trial beyond what would typically be expected of from that attorney, based on their experience and usual billable rate. This exception to the presumption that the lodestar is reasonable raises two questions: (1) why is this factor not already considered part of the lodestar and (2) what notice does the losing party have regarding liability for a higher amount.

First, why not consider the attorney's performance during litigation when determining reasonable attorneys' fees? District courts may still consider the prevailing market rate of the relevant community and adjust the rate within the lodestar based on the attorney's performance. Additionally, courts already consider the attorney's skill, customary fees, limitations on counsel,

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<sup>72</sup> *Id.*

<sup>73</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

<sup>74</sup> *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

<sup>75</sup> *Id.* at 898.

<sup>76</sup> 559 U.S. at 555.

<sup>77</sup> *See id.* at 554–55 (pointing to the number of years since a specific attorney had passed the bar as an example of a single objective criterion not reflected in the lodestar).

as well as the reputation and experience of the attorney when calculating the lodestar under the *Johnson* factors.<sup>78</sup> This new parameter may violate the rule that enhancement should not be based on a factor already subsumed in the lodestar calculation.<sup>79</sup> The distinction seems to imagine a Hollywood-esque scenario where a down-on-his-luck attorney pulls himself together and delivers an uncharacteristically brilliant performance in court to the astonishment and surprise of his peers.<sup>80</sup> Short of a camera-worthy performance, it is hard to imagine a distinction between this factor and the considerations already subsumed within the base lodestar.

Even though the Supreme Court permitted upward adjustments to the lodestar, courts generally do not apply an upward adjustment under this factor and consider it already subsumed within the lodestar figure.<sup>81</sup> Furthermore, the Supreme Court established that this factor requires “specific proof linking the attorney’s ability to the prevailing market.”<sup>82</sup> Therefore, justifying an enhancement under this factor requires the party seeking enhancement to provide specific evidence, and the court must provide factual findings to support a determination of enhancement.<sup>83</sup>

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<sup>78</sup> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

<sup>79</sup> *Perdue*, 559 U.S. at 553 (citing *Blum*, 465 U.S. at 898).

<sup>80</sup> See, e.g., *THE VERDICT* (20th Century Fox 1982) (depicting Paul Newman, a down-and-out attorney and alcoholic, who wins a malpractice case at trial when everyone predicted he would lose); *MY COUSIN VINNY* (20th Century Fox 1992) (depicting Joe Pesci, a New York City attorney trying his first case in rural Alabama, successfully defending his cousin with a theatrical trial performance involving cooking grits and specific knowledge of independent rear suspension systems).

<sup>81</sup> See, e.g., *Barati v. Metro-N. R.R.*, 939 F. Supp. 2d 153, 159 (D. Conn. 2013) (rejecting the plaintiff’s theory of enhancement based on the attorney’s nationally recognized specialization in train law and for being the first attorney to successfully litigate a Federal Rail Safety Act claim); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 59 (D.D.C. 2011) (rejecting the plaintiff’s assertion that enhancement was justified because the exceptional nature of the work performed was “self-evident”); *United States v. Sleep Med. Ctr.*, No. 3:12-CV-1080-J-39PDB, 2016 WL 11567785, at \*20 (M.D. Fla. Aug. 23, 2016) (denying enhancement when no specific evidence was offered); *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 485 (Fed. Cir. 2016) (reversing an enhancement determination that was based in part on an expeditious resolution that otherwise would result in significant fees).

<sup>82</sup> *Perdue*, 559 U.S. at 555.

<sup>83</sup> See, e.g., *Dungee v. Davison Design & Dev. Inc.*, 674 F. App’x 153, 157 (3d Cir. 2017); *Sleep Med. Ctr.*, 2016 WL 11567785, at \*20.

### B. *Extraordinary Outlay of Expenses*

The second situation laid out in *Perdue* permits enhancing the lodestar when the attorney includes an “extraordinary” outlay of expenses and when the litigation is “exceptionally” protracted.<sup>84</sup> As the Supreme Court pointed out, this situation likely occurs more often in civil rights litigation when a plaintiff is unable to afford legal representation, and the attorney understands that reimbursement will only be received at the end of litigation and only if the plaintiff prevails.<sup>85</sup> Enhancements under this scenario must be calculated with a reasonable and objective method that is reviewable on appeal.<sup>86</sup>

Not only must the expenses due be extraordinary, and the delay exceptional, but awarding an enhancement should be reserved for “unusual cases.”<sup>87</sup> Appellate courts, applying *Perdue*’s framework, have denied enhancement of fees when the rationale is not supported by objective or reasonable methods and when payment is delayed for five years.<sup>88</sup> There must be some unusual reason, distinguishable from normal delays and cases, to justify an award under this parameter.<sup>89</sup>

### C. *Exceptional Delay of Payment*

The third and final consideration is whether any extraordinary circumstances involve the exceptional delay in the payment of the fees.<sup>90</sup> Attorneys expecting compensation under fee-shifting statutes like 42 U.S.C. § 1988 understand that payment depends on the success of litigation and will generally come at the end of the case.<sup>91</sup> Therefore, delays in payment are foreseeable by attorneys in Title VII and civil rights cases.<sup>92</sup> Generally, awards are adjusted based on historical rates and present value calculations.<sup>93</sup>

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<sup>84</sup> 559 U.S. at 555.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Gray *ex rel.* Alexander v. Bostic, 613 F.3d 1035, 1045 (11th Cir. 2010) (quoting *Perdue*, 559 U.S. at 555).

<sup>88</sup> *Id.* at 1044–45 (quoting *Perdue*, 559 U.S. at 555).

<sup>89</sup> *Perdue*, 559 U.S. at 555.

<sup>90</sup> *Id.* at 556.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (quoting *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989)).

Enhancement is appropriate under this factor only when the delay is unanticipated or unjustifiably caused by the losing party.<sup>94</sup>

The respondents in *Perdue* argued that their attorneys made extraordinary outlays and that they had to wait for reimbursement.<sup>95</sup> The Court rejected this argument because the respondents did not provide proof that the delay was outside the normal range expected by attorneys relying on 42 U.S.C. § 1988.<sup>96</sup> Had proof been shown, the district court would need to explain how the enhancement would fix the harm caused by the delay.<sup>97</sup> Attorneys relying on this factor to enhance their fees will need to show that their delay was unusual under the circumstances.<sup>98</sup> Because the Court in *Perdue* did not discuss whether the losing party caused the delay (because it found no delay), the Court may have tacitly determined that this conditional factor is required since it cannot exist without delay. But the opinion did not mandate this, and, therefore, courts may stop their analysis on whether the delay was unusual.

#### *D. Circuit Courts are Reluctant to Apply Perdue's Hourly Rate Method and Strict Limitations to Enhancement*

*Perdue v. Winn* established that the lodestar enhancement may only be applied in few circumstances that are “rare” and “exceptional.”<sup>99</sup> The Supreme Court reaffirmed that the lodestar includes most, if not all, of the relevant factors constituting a reasonable fee.<sup>100</sup> Furthermore, enhancements to the lodestar should not be based on factors subsumed in the lodestar calculation.<sup>101</sup> Despite this guidance, appellate courts examining and applying *Perdue* avoid straying outside the boundaries of the three limitations when considering an enhancement. These courts continue to analyze lodestar enhancement issues through the guidance of the *Johnson* factors.

Appellate courts sometimes conflate the two methods or incorporate the *Johnson* factors into the enhancement consideration.<sup>102</sup> The Fifth Circuit case

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<sup>94</sup> *See id.*

<sup>95</sup> *Id.* at 557–58.

<sup>96</sup> *Id.* at 558.

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 556.

<sup>99</sup> *Id.* at 554.

<sup>100</sup> *Id.* at 553.

<sup>101</sup> *Id.*

<sup>102</sup> *Combs v. City of Huntington*, 829 F.3d 388, 393 (5th Cir. 2016) (stating that the *Johnson* factors may be used to make the determination of a reasonable attorney’s fee); *Brown v. Sullivan*,

*Combs v. City of Huntington*, examined a district court's downward adjustment to the lodestar award under 42 U.S.C. § 1988 in the wake of *Perdue*.<sup>103</sup> The *Combs* court considered the *Johnson* factors in its enhancement analysis, which is part of a two-step process.<sup>104</sup> First, the hourly rate method lodestar is calculated.<sup>105</sup> Then, the court may enhance or decrease the lodestar by the twelve *Johnson* factors.<sup>106</sup> The Fifth Circuit rejected a broad application of *Perdue* that would have limited the second step of the two-step analysis.<sup>107</sup>

Likewise, in *In re Market Center East Retail Property, Inc.*, the Tenth Circuit concluded that *Perdue* did not apply to attorneys' fees under a bankruptcy fee-shifting statute.<sup>108</sup> There, the court held that enhancement could be based on the *Johnson* factors.<sup>109</sup> The court reasoned that because the Tenth Circuit allows wide discretion to bankruptcy courts in awarding reasonable attorneys' fees, the *Johnson* factors may be considered and are not affect by *Perdue*.<sup>110</sup>

In *Muransky v. Godiva Chocolatier, Inc.*, the Eleventh Circuit discussed *Perdue* in the context of attorneys' fees awarded from a common fund.<sup>111</sup> Although *Perdue* also involved attorneys' fees from a common fund,<sup>112</sup> the *Muransky* court determined that "*Perdue* addresses fee-shifting statutes and says nothing about the award of attorney's fees from a common fund."<sup>113</sup> The *Muransky* court then addressed whether awarding a 33% of the settlement funds as attorneys' fees was an abuse of discretion when it had previously established a 25% fee as a benchmark.<sup>114</sup> That court considered the *Johnson* factors to evaluate the reasonableness of the award of eight percentage points

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917 F.2d 189, 192 (5th Cir. 1990) (stating that the "lodestar" once determined, may be adjusted up or down by considering the twelve *Johnson* factors).

<sup>103</sup> *Combs*, 892 F.3d at 391.

<sup>104</sup> *Id.* at 391–92.

<sup>105</sup> *Id.* at 392.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *In re Market Ctr. E. Retail Prop., Inc.*, 730 F.3d 1239, 1249 (10th Cir. 2013).

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* at 1248–49.

<sup>111</sup> *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1194 (11th Cir. 2019).

<sup>112</sup> *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1270 (N.D. Ga. 2006), *aff'd*, 532 F.3d 1209 (11th Cir. 2008).

<sup>113</sup> *Muransky*, 922 F.3d at 1195.

<sup>114</sup> *Id.*

above their prior benchmark and held that the award was not an abuse of the trial court's discretion.<sup>115</sup>

These aforementioned cases demonstrate an unwillingness to apply the simple hourly rate method and fall back on the more familiar and flexible *Johnson* factors when considering attorneys' fee awards. The reluctance to embrace *Perdue's* hourly-rate method adds to the confusion and ambiguity of when to award fees and by how much. A clear analytical framework should be adopted to avoid this confusion so litigators, parties, and courts can predictably award fees. This confusion is only amplified in diversity cases when a state's lodestar calculation methods are implicated.

#### IV. THE LODESTAR AND ENHANCEMENT UNDER STATE CAUSES OF ACTION

The Supreme Court in *Perdue* did not address whether the preference for the hourly rate method of calculating the lodestar applied to state fee-shifting statutes as well as federal.<sup>116</sup> Issues arise when district courts in diversity actions apply state fee-shifting statutes to state causes of action.<sup>117</sup> Each state has its own version of the *Johnson* factors.<sup>118</sup> The factors considered in determining enhancement may also diverge from *Johnson* and *Perdue*.<sup>119</sup> This confusion between which test to use has been recognized by the Texas Supreme Court on whether courts should use the *Johnson* factors when awarding attorney's fees under a state fee-shifting statute.<sup>120</sup> Some courts apply the state's enhancement factors while still considering *Johnson*.<sup>121</sup>

##### A. *The Texas Lodestar*

In Texas, courts first calculated reasonable attorney's fees by considering eight factors enumerated in *Arthur Andersen & Co. v. Perry Equipment*

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<sup>115</sup> *Id.*

<sup>116</sup> See *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

<sup>117</sup> See *City of San Antonio v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 U.S. Dist. LEXIS 58384, at \*41 (W.D. Tex. Apr. 17, 2017).

<sup>118</sup> See e.g., *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (considering factors enumerated in Texas Disciplinary Rules of Professional Conduct to assess reasonableness of a fee).

<sup>119</sup> See e.g., *Hotels.com*, 2017 U.S. Dist. LEXIS 58384, at \*42.

<sup>120</sup> *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 490 (Tex. 2019).

<sup>121</sup> *Hotels.com*, 2017 U.S. Dist. LEXIS 58384, at \*41-42.



*Corp.*<sup>122</sup> Similar to the federal lodestar after *Blum* and *Hensley*, Texas also developed the “traditional” method to calculating the lodestar by the reasonable hours and rate.<sup>123</sup> Calculating this lodestar was said to be a two-step process following the *El Apple* decision.<sup>124</sup> Like in federal courts, Texas courts and practitioners have confused the two methods.<sup>125</sup> Texas cases following *El Apple* added to the confusion by implying – whether intentionally or not – that attorneys may choose the lodestar method and therefore the enhancement.<sup>126</sup>

Until recently, the Texas Supreme Court was silent on whether to allow enhancement to an award of attorney’s fees.<sup>127</sup> As a result, district courts in Texas performed “*Erie* guesses” in diversity cases for enhancements issues.<sup>128</sup> District courts in these cases followed Texas enhancement limitations instead of the *Perdue* factors and permitted enhancements by applying the Texas *Arthur Andersen* factors such as extraordinary results obtained and contingent nature of the case.<sup>129</sup>

Recently the Texas Supreme Court in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* clarified that, in Texas, there is only one lodestar method.<sup>130</sup> In Texas, the *Arthur Andersen* factors apply across all fee-shifting awards

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<sup>122</sup> 945 S.W.2d at 818 (Similar to *Johnson*, the *Arthur Andersen* factors followed the Texas Disciplinary Rules of Professional Conduct 1.04 and are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.).

<sup>123</sup> *Venture*, 578 S.W.3d at 490 (quoting *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.)).

<sup>124</sup> *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012).

<sup>125</sup> *Venture*, 578 S.W.3d at 490.

<sup>126</sup> *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013); Mark E. Steiner, WILL EL APPLE TODAY KEEP ATTORNEYS’ FEES AWAY?, 19 J. CONSUMER & COM. L. 114, 118 (2016) (discussing how *Montano* may allow attorneys to choose which lodestar method to use to calculate attorneys’ fees).

<sup>127</sup> *El Apple I*, 370 S.W.3d at 765.

<sup>128</sup> *Jackson v. Host Intern., Inc.*, 426 F. App’x 215, 227 (5th Cir. 2011).

<sup>129</sup> *City of San Antonio v. Hotels.com, L.P.*, N. 5-06-CV-381-OLG, 2017 U.S. Dist. LEXIS 58384, at \*42 (W.D. Tex. Apr. 17, 2017).

<sup>130</sup> 578 S.W.3d at 490, 496.

and the hourly rate lodestar method is only a “shorthand version” of those factors.<sup>131</sup> This combination of the two methods is distinct from the federal approach in *Perdue*, where the two methods are separate and alternative calculations of reasonable attorney’s fees.<sup>132</sup>

*Venture* also clarified that Texas permits adjusting the lodestar up or down.<sup>133</sup> The adjustment, like the federal framework, cannot be based on considerations already subsumed within the base lodestar.<sup>134</sup> Specifically, *Venture* eliminates the consideration of contingent fees and “results obtained” to support enhancement when the results obtained are not reflected in the lodestar;<sup>135</sup> two factors that courts often used to justify enhancing the lodestar.<sup>136</sup>

Although the Texas Supreme Court recognized the ability to enhance the lodestar, the Court restricted the considerations that trial courts could use.<sup>137</sup> These limitations do not go as far as the federal limitations in *Perdue*, but it demonstrates a trend that courts are removing discretion from the trial judges when it comes to enhancement.<sup>138</sup> Although the *Venture* court sought to clarify the two-step method by stating that the hourly rate method is a shorthand version of the multi-factor method, it likely added to the confusion of which method to apply under the context of *Perdue*.<sup>139</sup>

## V. DUE PROCESS IMPLICATIONS OF LODESTAR ENHANCEMENT

Even though courts continue to limit enhancing the lodestar, enhancement could violate a party’s right to due process.<sup>140</sup> Courts have not analyzed an enhancement under due process, but the right could be violated if enhancement becomes too large.<sup>141</sup> One consequence of fee-shifting statutes in the context of the American Rule is that they inevitably punish the non-

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<sup>131</sup> *Id.* at 490, 494, 496.

<sup>132</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550–51 (2010).

<sup>133</sup> 578 S.W.3d at 500.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 500, n.12.

<sup>136</sup> *City of San Antonio v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 U.S. Dist. LEXIS 58384, at \*42 (W.D. Tex. Apr. 17, 2017).

<sup>137</sup> *Venture*, 578 S.W.3d at 492, 500–01.

<sup>138</sup> *See id.*

<sup>139</sup> *See id.* at 499–501.

<sup>140</sup> *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994).

<sup>141</sup> *See id.*

prevailing party.<sup>142</sup> Courts have stated that enhancement should not be awarded for the purpose of punishing the losing party.<sup>143</sup> It is difficult, however, to not view an enhancement of reasonable fees, in the context of the American Rule, as being non-punitive to the losing party, especially when enhancement adds to a presumptively reasonable fee; compensating the prevailing party's attorney's fees is one purpose of punitive damages.<sup>144</sup>

### A. Punitive Damages

Punitive damages, also known as exemplary or vindictive damages, have been a form of civil relief since the Code of Hammurabi in 2000 B.C.<sup>145</sup> Modern punitive damages were born out of eighteenth-century English common law as a form of compensatory damages intended to compensate a party for intangible losses, such as mental anguish, hurt feelings, and wounded dignity.<sup>146</sup> The doctrine of punitive damages was imported to the United States and first adopted in *Coryell v. Colbaugh*, a case involving seduction and a breach of promise to marry.<sup>147</sup> In *Coryell*, the judge instructed the jury to award seventy-five pounds in exemplary damages “to prevent such offences in [the] future” for what he described as conduct involving “the most atrocious and dishonorable nature.”<sup>148</sup>

Punitive damages have since developed into a distinct category that is in addition to and typically predicated on an award of actual damages.<sup>149</sup> The purpose of exemplary damages is to punish past conduct, deter future conduct, and compensate a litigant.<sup>150</sup> The amount of punitive damages to be awarded is determined by juries and upheld by courts.<sup>151</sup> This framework, however, often leads to juries awarding an excessive amount of punitive damages to a party.<sup>152</sup>

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<sup>142</sup> See *Venture*, 578 S.W.3d at 476, 487.

<sup>143</sup> *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001).

<sup>144</sup> 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 3.11(3), at 482 (2d ed. 1993).

<sup>145</sup> KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1), at 24 (1980).

<sup>146</sup> *Id.* § 2.2(B), at 28.

<sup>147</sup> 1 N.J.L. 77, 77–78 (N.J. 1791).

<sup>148</sup> *Id.*

<sup>149</sup> DOBBS, *supra* note 144, § 3.11(10), at 512.

<sup>150</sup> *Id.* § 3.11(2), at 467–68.

<sup>151</sup> REDDEN, *supra* note 145, § 2.2(A)(2), at 26.

<sup>152</sup> See *id.*

In response, courts often limit excessive punitive damages. Traditionally, courts would dismiss a case or set aside excessive jury verdicts and order a new trial; the first jury verdict set aside for awarding punitive damages occurred in England in 1655.<sup>153</sup> Starting in the early 1980s, a growing “tort reform” movement in the United States inspired courts and legislatures to create new limitations on punitive damages.<sup>154</sup> Not every state, however, limited or required that courts review punitive damages.<sup>155</sup> Oregon passed a constitutional amendment prohibiting judicial review of the amount of punitive damages awarded by a jury.<sup>156</sup> In response, the Supreme Court in *Honda Motor Co. v. Oberg* held that the due process clause required judicial review of punitive damages.<sup>157</sup> The Supreme Court in *Oberg* was particularly concerned with punitive damages being imposed arbitrarily without safeguards or standards.<sup>158</sup>

The efforts to define how to review punitive damage awards culminated in the landmark case, *BMW of North America v. Gore*, which established that constitutional due process requires meaningful limits to punitive damages.<sup>159</sup> Building on to *Oberg*, the Supreme Court felt that it was necessary to define precise legal standards to satisfy constitutional concerns arising from arbitrarily depriving a party of property through excessive punitive damages.<sup>160</sup> The Supreme Court held that due process and “[e]lementary notions of fairness” limits excessive punitive damage awards.<sup>161</sup> The crux of the holding was based on the principle that a party should receive fair notice of the conduct that will subject them to punishment and the severity of the punishment.<sup>162</sup> The Court resisted drawing bright-line standards and instead created three general guideposts for courts to consider in order to effectuate this principle and determine whether a punitive damages figure was unconstitutionally excessive:

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<sup>153</sup> *Id.*

<sup>154</sup> DOBBS, *supra* note 144, § 3.11(1), at 459.

<sup>155</sup> *See, e.g.*, OR. CONST. art. VII, § 3.

<sup>156</sup> *Id.*; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994).

<sup>157</sup> 512 U.S. at 420, 435.

<sup>158</sup> *Id.* at 420.

<sup>159</sup> *See* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 585–86 (1996).

<sup>160</sup> *See id.* at 587–88 (Breyer, J., concurring).

<sup>161</sup> *See id.* at 574 (majority opinion).

<sup>162</sup> *See id.*

- (1) The degree of reprehensibility of the conduct;<sup>163</sup>
- (2) The ratio of punitive damages to actual damages;<sup>164</sup> and
- (3) Sanctions for comparable misconduct.<sup>165</sup>

These guideposts, however, did little to guide courts in states without statutorily defined limits because they allowed significant discretion in determining whether a punitive damage award was violative of the due process clause until 2003.<sup>166</sup>

In 2003, the Supreme Court narrowed the *Gore* guideposts in *State Farm Mut. Auto. Ins. Co. v. Campbell* because of heightened concerns over arbitrary deprivation of property.<sup>167</sup> In *Campbell*, the Utah Supreme Court applied the *Gore* guideposts and upheld a punitive damage award of \$145 million in addition to \$1 million in compensatory damages.<sup>168</sup> Concerned with an award supported by evidence with little bearing to the punitive damages the Supreme Court reversed and created the current framework for applying the *Gore* guideposts.<sup>169</sup> First, the degree of reprehensibility of the conduct must have a nexus to the specific harm suffered.<sup>170</sup> Second, the ratio of punitive damages to compensatory damages must be reasonable.<sup>171</sup> The Supreme Court did not provide an exact demarcation to the ratio, but stated that “few awards exceeding a single-digit ratio . . . will satisfy due process.”<sup>172</sup> Lastly, the existence of a criminal sanction does not

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<sup>163</sup> *Id.* at 575–76 (indicating that the greater the reprehensibility, the more likely a higher award is constitutional).

<sup>164</sup> *Id.* at 580–81 (indicating that the lower the ratio, the greater likelihood that the award is constitutional).

<sup>165</sup> *Id.* at 583 (noting that comparable criminal punishments indicate the importance of deterrence to a State).

<sup>166</sup> DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES CASES AND MATERIALS 239 (4th ed. 2010).

<sup>167</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003).

<sup>168</sup> *Id.* at 415.

<sup>169</sup> *Id.* at 418.

<sup>170</sup> *Id.* at 419.

<sup>171</sup> *Id.* at 424, 426.

<sup>172</sup> *Id.* at 425. On remand, the Utah Supreme Court reduced the punitive damages in *Campbell* to \$9 million and the U.S. Supreme Court declined certiorari, tacitly creating a nine-to-one ratio as being constitutional. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 98 P.3d 409, 420 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004).

automatically sustain an award of punitive damages, and the wealth of the defendant cannot be considered when determining the amount.<sup>173</sup>

The *Gore* and *Campbell* courts established constraints on excessive punitive damages based on concerns over arbitrary justifications for excessive awards.<sup>174</sup> The general concern over the constitutionality and reasonableness of an award was the guiding rationale of the *Gore* and *Campbell* Courts.<sup>175</sup> Establishing a clear framework for reviewing jury verdicts upholds the principle of fairness and notice to defendants of the specific conduct they may expect to result in punishment.<sup>176</sup> Clear restrictions by courts and legislatures will prevent future judgments from imposing unjust, surprising, and unreasonable awards of punitive damages, and the same guidance should apply to court awarded attorneys' fees.

### B. *Enhancement of the Lodestar Through the Lens of Gore and Campbell*

Punitive damages are upheld if within the limits set out in *Gore*, so why shouldn't the lodestar enhancement? The result is the same; the payment comes out of the losing party's wallet.<sup>177</sup> The difference is in the rationale and it is significant. When it comes to enhancement, courts are in effect punishing the losing party for extraordinary circumstances that are outside their control and determined by the prevailing party.<sup>178</sup> To support awarding punitive damages, courts generally look to the actions of the defendant.<sup>179</sup> Forcing a losing party to pay additional damages because of disfavored conduct discourages future wrongdoers and serves as retribution or justice to the opposing party for the harm suffered.<sup>180</sup> Factors that support enhancing attorney's fees, however, focus on the actions of the prevailing party, not the losing party.<sup>181</sup> Instead of punishment that may deter future wrongdoers, enhancement is meant to reward the prevailing party under exceptional

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<sup>173</sup> *Campbell*, 538 U.S. at 427–28. Ever since *Coryell v. Colbaugh*, U.S. courts have explained that a defendant's monetary situation should not be considered when determining the amount of punitive damages. 1 N.J.L. 77, 78 (N.J. 1791).

<sup>174</sup> *Campbell*, 538 U.S. at 418; *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

<sup>175</sup> See *Campbell*, 538 U.S. at 426; *Gore*, 517 U.S. at 583.

<sup>176</sup> *Gore*, 517 U.S. at 574.

<sup>177</sup> *Id.* at 565; *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 548 (2010).

<sup>178</sup> *Perdue*, 559 U.S. at 554.

<sup>179</sup> *Gore*, 517 U.S. at 575.

<sup>180</sup> See *id.* at 592–93 (Breyer, J., concurring).

<sup>181</sup> See *Perdue*, 559 U.S. at 553–57.

circumstances to the determinant of the unknowing losing party.<sup>182</sup> Given the background of the American Rule, the same guideposts the Supreme Court followed in *Gore* and *Campbell* should generally apply limit enhancement considerations as well.

The Supreme Court in both *Gore* and *Campbell* was particularly concerned with arbitrary and grossly excessive punishments violating due process.<sup>183</sup> This concern arose out of the basic notions of unfairness from depriving citizens of life, liberty, or property through the application of arbitrary coercion.<sup>184</sup> The same issues enunciated in *Gore* and *Campbell* regarding the lack of review, lack of notice to the defendant, and notions of fairness exist with fewer limitations when the lodestar is modified.

Like the rationale in *Gore*, the factors that were created to support enhancing the lodestar violate the same due process protections to losing parties. The *Gore* guideposts, however, do not fit perfectly in a lodestar enhancement analysis. The second guidepost is perhaps the easiest limitation that can be transferred to restricting the lodestar enhancement because it deals with the ratio between actual fees and the enhancement amount.<sup>185</sup> The greater the ratio, the more likely it will violate due process with awards within the single-digit ratio range likely to satisfy due process.<sup>186</sup>

The first guidepost looks at the degree of reprehensibility of the defendant's conduct.<sup>187</sup> *Campbell* requires that a nexus exists between the reprehensible conduct and a specific harm suffered.<sup>188</sup> This guidepost may fit under the *Perdue* framework's second and third enhancement justifications where enhancement may be justified when litigation is exceptionally protracted or when there are exceptional delays in the payment of fees.<sup>189</sup> Those *Perdue* factors may be related to the actions of the losing party and thus justify the enhancement.<sup>190</sup> The more protracted the litigation and the

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<sup>182</sup> *See id.* at 554–55.

<sup>183</sup> *See* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003); *Gore*, 517 U.S. at 574.

<sup>184</sup> *Gore*, 517 U.S. at 586 (Breyer, J., concurring).

<sup>185</sup> *Gore*, 517 U.S. at 580 (majority opinion).

<sup>186</sup> *Id.* at 580–81.

<sup>187</sup> *Id.* at 575.

<sup>188</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

<sup>189</sup> *See* *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555–56 (2010).

<sup>190</sup> *See id.*

longer the delay by the losing party, if caused by the losing party, the more likely an enhancement satisfies due process.<sup>191</sup>

Some courts, however, have enhanced the lodestar for reasons unrelated to the behavior of the losing party.<sup>192</sup> When the factors considered to enhance the lodestar are based on results obtained at trial and the fee arrangement then the enhancement amount is more likely to violate due process because the defendant is penalized for reasons outside of its control.<sup>193</sup> The losing party's behavior does not put it on notice of paying additional funds to the prevailing party.<sup>194</sup>

The third guidepost from *Gore* is more difficult to carry over into the realm of attorney's fee cases because fee-shifting as a criminal sanction is entirely different than in the civil context.<sup>195</sup> Civil fee-shifting statutes create incentives for attorneys to take on cases where small damages would otherwise dissuade them from doing so.<sup>196</sup> The enhancement is therefore framed as a reward to encourage litigation, while punitive damages are framed as a deterrent against wrongdoing.<sup>197</sup> In the criminal setting, the Constitution requires the appointment of counsel for defendants unable to afford an attorney.<sup>198</sup> This effectively creates a fee-shifting regime for most criminal defendants without seeing it that way.<sup>199</sup> The third *Gore* guidepost is therefore difficult to transfer and adapt in the lodestar enhancement context.

The effect of enhancing the lodestar to the defendant is the same as paying punitive damages; the money is taken out of the losing party's pocket whether it's a reward or punishment.<sup>200</sup> Under the background of the American Rule, this is a difference without a distinction. The rationale of forcing the losing

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<sup>191</sup> *Id.*

<sup>192</sup> *See infra* Part V.C.

<sup>193</sup> *See Perdue*, 559 U.S. at 554–55.

<sup>194</sup> *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

<sup>195</sup> *See Pamela S. Karlan, Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 583 (1995).

<sup>196</sup> *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1029 (Or. 1977). These “statutory measures of recovery beyond actual compensation may be designed to make a private suit worthwhile where individual damages are small or difficult to prove.” *Id.* (Linde, J., dissenting).

<sup>197</sup> Karlan, *supra* note 195, at 584; *Perdue*, 559 U.S. at 555 (2010).

<sup>198</sup> U.S. Const. amend. VI; Karlan, *supra* note 195, at 583.

<sup>199</sup> *See* Karlan, *supra* note 195, at 583–84.

<sup>200</sup> *Compare BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 566 (1996), with *Perdue*, 559 U.S. at 555.



party to pay the prevailing party may be more unfair than the justifications for punishment. The payment is ultimately extracted from the opposing party either way, but unlike punitive damages, the losing party did not perform any undesirable behavior.<sup>201</sup> The need for clear limitations on lodestar enhancements is therefore needed to avoid unconstitutionally depriving citizens of their life, liberty, and property simply as a reward to another party.<sup>202</sup>

### C. Texas Statutorily-Created Restrictions on Lodestar Enhancement

Texas has placed some restrictions on the amount by which the lodestar may be enhanced.<sup>203</sup> In Texas, attorney's fee enhancements in class action claims are limited to a range between 25% and 400%.<sup>204</sup> In making its determination, a court must consider the factors specified under the Texas Disciplinary Rules of Professional Conduct.<sup>205</sup> The explicit limit of four times the lodestar under the Texas scheme would satisfy the constitutional ratio issue of enhancement to actual fees, however, not all fee-shifting statutes include enhancement limitations or guidance.<sup>206</sup>

An interesting limitation of Rule 41 of the Texas Rules of Civil Procedure is the second requirement that courts must consider the factors listed in the Texas disciplinary rules.<sup>207</sup> In Texas, the lodestar figure is determined by considering the *Arthur Andersen* factors.<sup>208</sup> The *Arthur Andersen* Court based these factors off the Texas Disciplinary rules on fees.<sup>209</sup> Following *Perdue*, decisions by the Texas Supreme Court limit enhancements of the lodestar to considerations not already subsumed in the first step of the lodestar method for determining reasonable and necessary fees.<sup>210</sup>

This creates a conflict because the factors created by courts contradict the express requirement enumerated under Rule 41. Since the *Arthur Andersen* factors are the same as the Texas Disciplinary Rules for determining

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<sup>201</sup> *Perdue*, 559 U.S. at 554–56.

<sup>202</sup> *See Gore*, 517 U.S. at 587–88.

<sup>203</sup> TEX. R. CIV. P. 42(i).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.50(d).

<sup>207</sup> TEX. R. CIV. P. 42(i).

<sup>208</sup> *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

<sup>209</sup> *Id.*

<sup>210</sup> *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019).

attorney's fees, courts are unable to both follow the mandate to not consider factors already subsumed in the lodestar calculation and the requirement that they "must consider the factors specified" in the Texas Disciplinary Rules.<sup>211</sup>

Enhancement should not be based on factors already considered in the base lodestar in order to avoid redundancy. Furthermore, it could lead to unreasonable results by double counting factors to increase awards.<sup>212</sup> If courts continue to consider the *Johnson* factors in the base lodestar stage of the calculation, then that is where the adjustments should occur.<sup>213</sup> *Perdue* expressly permits adjusting an attorney's hourly rate in accordance with the attorney's ability relative to the market rate.<sup>214</sup> This adjustment could draw from the *Johnson* factors to determine whether the attorney's ability exceeds or falls behind attorneys in the relevant market, but it should not be used to enhance the lodestar. Texas differs from this approach and allows enhancement by considering the multi-factors.<sup>215</sup>

#### *D. Large Lodestar Enhancements May Still Satisfy Due Process*

In *City of San Antonio v. Hotels.com*, a recent class action case out of the Western District of Texas, the court enhanced the lodestar figure by an additional \$12.3 million.<sup>216</sup> In *Hotels.com*, several Texas municipalities instituted a class action against online-travel-booking companies to collect unpaid hotel-occupancy taxes.<sup>217</sup> The court calculated the lodestar to be \$10,005,790.50 by multiplying the reasonable hours billed by the reasonable rate.<sup>218</sup> The court further enhanced this amount by 250% because of the extraordinary results obtained by the plaintiffs' attorneys and the contingent nature of the case.<sup>219</sup> Although a staggering amount, this verdict satisfies the Texas limitations between 25% and 400% under the class action statute.<sup>220</sup>

The *Hotels.com* award would also likely satisfy the same guidepost restrictions the Supreme Court placed on excessive punitive damages in

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<sup>211</sup> Compare TEX. R. CIV. P. 42(i), with *Venture*, 578 S.W.3d at 489–90.

<sup>212</sup> *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001).

<sup>213</sup> *Id.*

<sup>214</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555 (2010).

<sup>215</sup> See *Venture*, 578 S.W.3d at 496.

<sup>216</sup> No. 5-06-CV-381-OLG, 2017 U.S. Dist. LEXIS 58384, at \*48 (W.D. Tex. Apr. 17, 2017).

<sup>217</sup> *Id.* at \*8–9.

<sup>218</sup> *Id.* at \*40.

<sup>219</sup> *Id.* at \*40–42.

<sup>220</sup> TEX. R. CIV. P. 42(i).

*Gore*.<sup>221</sup> The only transferable guidepost from the rationale regarding limitations on punitive damages to attorney's fees is the ratio.<sup>222</sup> The ratio of 2.5 times the amount in attorney's fees in *Hotels.com* likely satisfies due process because it fits well below an award not "exceeding a single-digit ratio."<sup>223</sup> The other two *Gore* factors could possibly fit under the facts here.

In *Hotels.com*, the court justified enhancing the lodestar because of the contingent nature of the case and the results obtained by the plaintiffs.<sup>224</sup> The enhancement justification has nothing to do with the behavior of the defendants because both factors derive from the plaintiffs' relationship with their attorneys.<sup>225</sup> If the first *Gore* factor is applied, it would point in favor of being unconstitutional since there is no nexus between any reprehensibility of the defendant's conduct and the enhancement amount.<sup>226</sup>

## VI. CONCLUSION

At best, fee-shifting statutes serve an important role in the American legal system by encouraging attorneys to provide legal work to indigent clients. At worst, fee-shifting statutes act as punishment levied on the losing party. Balancing policy concerns when considering legal fees is essential to maintain the notion of fairness within the legal system. The method courts calculate attorney's fees, however, is inconsistent and threatens notions of fairness. Even after *Perdue*, federal courts confuse the *Johnson* multi-factor method with the hourly rate method favored by the Supreme Court. Procedural confusion is compounded when courts determine whether to apply an enhancement to an award of attorney's fees. Fee award inconsistencies are due in part to the reluctance of courts to apply the strict *Perdue* limitations and instead, courts continue to use the *Johnson* factors for guidance. Further confusion adds to this inconsistency when federal courts maintain diversity jurisdiction and apply state fee-shifting statutes that differ procedurally from the federal framework.

Additionally, the lodestar enhancement is punitive in nature and is a punishment by any other name from the perspective of the losing party. The punitive aspect of the lodestar enhancement implicates a losing litigant's

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<sup>221</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

<sup>222</sup> TEX. R. CIV. P. 42(i).

<sup>223</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

<sup>224</sup> *Hotels.com*, 2017 U.S. Dist. LEXIS 58384, at \*45–48.

<sup>225</sup> *Id.*

<sup>226</sup> See *Campbell*, 538 U.S. at 422.

constitutional right of due process. Regardless of whether enhancement is violative of due process, however, courts will likely continue to pick and choose their preferred method. The U.S. legal system would probably be better off discarding the lodestar enhancement procedure altogether—an event unlikely to ever occur—but as long as it continues, a uniformed framework is necessary to end inconsistent awards.

APPENDIX: PROPOSED FRAMEWORK FOR DETERMINING REASONABLE ATTORNEY'S FEES AND ENHANCEMENT UNDER CURRENT LAW.

In the wake of *Perdue v. Winn*, courts continue to ignore the strict limitations on fee enhancement. Additionally, courts inconsistently apply and conflate the *Johnson* factors method and hourly rate lodestar in calculating reasonable fees. To develop a uniform framework and predictable process, below is a suggested analysis for applying each lodestar method in federal court following *Perdue*.

**Threshold Question:** Does subject matter jurisdiction of the underlying cause of action arise under a federal question or diversity?

**(1) If Federal Question Jurisdiction:** Look to the applicable federal fee-shifting statute.

(a) Calculate the lodestar under the hourly rate method:

- Hours expended on the litigation;
- Multiplied by the hourly rate from the relevant legal community
  - Consider any relevant *Johnson* factors that support adjusting the attorney's rate by his ability relative to the community.

(b) Consider enhancement under *Perdue v. Winn*:

- Apply the three *Perdue* "guideposts" to determine whether "rare" or "exceptional" circumstances justify enhancement:
  - Market Rate as an inadequate Measure
  - Extraordinary Outlay of Expenses
  - Exceptional Delay of Payment

(c) If an enhancement is warranted, consider the *BMW v. Gore* guideposts to ensure the enhancement amount is not unconstitutional.

**(2) If Diversity Jurisdiction:** Look to the applicable state fee-shifting statute.

(a) Determine the method for calculating the lodestar by following state court guidance.

- Determine whether the state is silent on enhancement.
  - If the state is not silent, follow the state's guidance and limitations on enhancement.

(b) If the state permits enhancement and enhancement is warranted, consider the *BMW v. Gore* guideposts to ensure the enhancement amount is not unconstitutional.