

LITIGATING THE YANKEE TAX: APPLICATION OF THE LODESTAR TO ATTORNEYS' FEE AWARDS IN COMMON FUND LITIGATION

BRUCE R. BRAUN* AND W. GORDON DOBIE**

I.	INTRODUCTION	897
II.	THE COMMON FUND DOCTRINE.....	900
III.	THE FLORIDA SUPREME COURT'S DECISION	908
IV.	A SOLUTION IN SEARCH OF A PROBLEM	909
	A. <i>Public Policy Favors a Fee System That Is Not Based on the Hours Expended</i>	910
	B. <i>Abusive Strike Suits May Receive a Boost Under the Majority's Opinion...</i>	912
	C. <i>Conversely, Individuals Seeking To Challenge State Actions May Find the Courthouse Door Closed</i>	913
V.	CONCLUSION.....	915

I. INTRODUCTION

In the winter of 1991, attorneys at a prestigious national law firm in the nation's Midwest were faced with a unique proposition. Although the firm had a long list of well-heeled, blue-chip clients who could afford the firm's substantial hourly rates, the firm's newest potential client was neither a Fortune 100 corporation nor a high net worth individual. Instead, the client was a citizen of the far-off State of Florida who was seeking to entice these white-shoe lawyers into entering the world of contingent class action litigation.

Having just purchased a used 1978 Cadillac Seville in Chicago for \$500, David Kuhnlein had driven it home to Florida only to find that it would cost him nearly that much simply to obtain the necessary Florida registration and plates to own and operate the vehicle in his home state. Kuhnlein had purchased numerous in-state vehicles in the preceding decade, and he never encountered the \$295 "Vehicle Impact Fee" the Florida Legislature had enacted the prior year on all vehicles previously titled out

* Associate, Winston & Strawn, Chicago, Illinois. B.A., 1985, Haverford College; J.D., 1989, University of Virginia. Mr. Braun has also held the following positions: Editor-in-Chief, *Virginia Law Review*; Law Clerk, 1989-90, United States Court of Appeals for the Seventh Circuit, The Honorable Joel M. Flaum; Law Clerk, October Term, 1990, United States Supreme Court, The Honorable William H. Rehnquist. Along with the co-author and Christopher Kay and Michael Beaudine of Kay, Panzl & Latham, Mr. Braun served as co-counsel for the class in the Vehicle Impact Fee litigation.

** Partner, Winston & Strawn, Chicago, Illinois. B.A., 1982, Boston University; J.D., 1986, Washington University. Mr. Dobie was the Managing Editor of the *Washington University Law Quarterly*. Along with the co-author and Christopher Kay and Michael Beaudine of Kay, Panzl & Latham, Mr. Dobie served as co-counsel for the class in the Vehicle Impact Fee litigation.

of state.¹ The so-called “Yankee tax” that he paid was intended by the Legislature to offset the burden imposed by numerous individuals and families moving to Florida each day.²

Outraged over the discriminatory unfairness of such a fee, Kuhnlein contacted these lawyers to see whether they would be interested in representing him in litigation seeking a refund of the fee. Because he had only \$295 at stake, it was obvious that any suit challenging the fee would have to proceed as a class action on behalf of all similarly situated Florida citizens.

Accordingly, these attorneys were faced with a series of decisions. On its face, the Impact Fee provision raised substantial concerns under the Commerce Clause of the United States Constitution, which prohibits states from enacting laws that unduly burden or discriminate against interstate commerce.³ Since litigation attacking the Impact Fee on such grounds would be a class action seeking a refund of taxes from the State, the attorneys’ only reward for successfully prosecuting the litigation would be an award of attorneys’ fees. In addition, the attorneys would be required to fund the entire litigation until final judgment, which, in light of Florida’s congested trial and appellate court systems, could take up most of the decade. Thus, if the litigation were unsuccessful for any reason, be it substantive or procedural, the attorneys would be left footing the entire bill, including all of the considerable expenses implicated by such a complex case. In light of these risks, the attorneys would—indeed, could—take the case only on the promise of compensation well beyond the normal hourly rate.

At that time, both Florida and Eleventh Circuit precedent provided that an award of attorneys’ fees in common fund litigation such as this would be based on a percentage of the common fund recovered.⁴ Both jurisdictions in such cases had abandoned the “lodestar” or “multiplier” method in which attorneys are limited to a reasonable hourly rate multiplied by a number based on factors such as the complexity of the litigation.⁵ With the promise of the possibility of a percentage fee, the attorneys agreed to take the case. They agreed to represent the class of 648,000 citizens of Florida who had paid the Impact Fee because they believed that the risks inherent in such highly contingent litigation were well worth taking in light of even the remote prospect of a hefty percentage recovery.

1. The Vehicle Impact Fee, FLA. STAT. § 319.231 (repealed by 1995, Fla. Laws ch. 95-140).

2. *Kuhnlein v. Florida Dep’t of Revenue*, No. 92-6224, slip op. at 7-9 (Fla. 9th Cir. Ct. Nov. 30 1993).

3. U.S. CONST. art. I, § 8, cl. 3.

4. *Camden I Condominium Ass’n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991); *Tenney v. City of Miami Beach*, 11 So. 2d 188 (Fla. 1942).

5. *Camden I*, 946 F.2d at 768; *Tenney*, 11 So. 2d at 188.

After four years of rough-and-tumble litigation, the Impact Fee attorneys achieved a phenomenal and unprecedented result. In a unanimous decision, the Florida Supreme Court affirmed the state trial court's decision⁶ striking down the Impact Fee under the Commerce Clause and ordering a refund of the \$188 million of Impact Fees the State of Florida had collected since it enacted the unconstitutional tax in 1991.⁷

With this hard-fought victory in hand and the refund process well on its way, the Impact Fee attorneys then filed a petition for fees and expenses in which they requested a fee award of fourteen percent of the common fund, a figure they arrived at by examining awards in comparable cases.⁸ The Impact Fee attorneys asserted that a fourteen percent fee was justified in light of the risks they had taken and the results they had achieved. These risks, which would have constituted a complete bar to recovery, included the possibility that the court would find that (1) the failure to exhaust administrative remedies barred a suit in state court; (2) taxpayers could not seek a refund through the class action mechanism; (3) other remedies short of a refund were constitutionally permissible; or (4)

6. On November 30, 1993, the trial court granted summary judgment and ordered a full refund to the Class. *Florida Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), *cert. denied*, 115 S. Ct. 2608 (1995). Subsequently, the Florida Supreme Court affirmed the trial court's denial of the Class's motion for prejudgment and postjudgment interest. *Florida Dep't of Revenue v. Kuhnlein*, 662 So. 2d 308 (Fla. 1995).

7. *Kuhnlein*, 646 So. 2d at 726.

8. See, e.g., *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622 (E.D. Pa. 1986) (awarding 33.3% in case pending for five years because plaintiffs had survived summary judgment and a number of other motions and had done a significant amount of discovery); *In re AIA Indus., Inc. Sec. Litig.*, No. 84-2276, 1988 WL 33883 (E.D. Pa. Mar. 31, 1988) (awarding 33% after substantial discovery and lengthy settlement negotiations; case pending approximately three years); *Greene v. Emersons Ltd.*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,263 (S.D.N.Y. May 20, 1987) (involving fees and costs of 46.2% in protracted case taking over ten years to resolve); *Eltman v. Grandma Lee's, Inc.*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,798 (E.D.N.Y. 1986) (awarding 33% after four years of extensive discovery, motions, and settlement negotiations); *In re Infant Formula Antitrust Litig.*, MDL No. 878, 1992 WL 503465 (N.D. Fla. Sept. 7, 1993) (granting 25% fee award, resulting in a fee of \$31.4 million, after class counsel's settlement of antitrust matter for \$125 million); *In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz. July 24, 1990) (awarding class counsel 25% of the first \$150 million of any settlement, 29% for all amounts thereafter, plus additional percentages as incentives to settle the case expeditiously); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912 (D.P.R. 1991) (awarding \$35 million of \$220.9 million settlement); *In re RJR Nabisco, Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984 (S.D.N.Y. 1992) (awarding \$17.7 million plus expenses—an amount representing 25% of \$72.5 million settlement fund); *In re Plywood Antitrust Litig.*, MDL No. 159 (E.D. La. Apr. 29, 1983) (awarding 15% of \$171 million of the settlement fund). The court-awarded fee is also far below the percentage awarded in taxpayer class actions in Florida and elsewhere. See *City of Miami Beach v. Jacobs*, 341 So. 2d 236 (Fla. 3d DCA 1976) (awarding fee of 37% of the common fund), *cert. denied*, 348 So. 2d 945 (Fla.), and *cert. denied*, 434 U.S. 939 (1977); *Tenney*, 11 So. 2d at 188 (awarding fee of 33% of fund); *City of Ozark v. Trawick*, 604 So. 2d 360 (Ala. 1992) (approving 33% fee award from common fund); *State v. Private Truck Council of Am., Inc.*, 371 S.E.2d 378 (Ga. 1988) (approving 33% fee award from common fund).

the statute was not, despite its facial discrimination, unconstitutional. In similar cases, courts have ruled against classes seeking refunds on these grounds and, thus, have left the attorneys with the bill for the costs and expenses for the entire litigation and without a reasonable attorneys' fee.⁹

Therefore, when the trial court awarded a reasonable attorneys' fee of ten percent of the common fund,¹⁰ it appeared that these numerous, real risks had been worth taking—or so it seemed.

A few months after the trial court's award, the Florida Supreme Court overruled existing precedent, parted ways with the Eleventh Circuit, and rejected the modern and majority percentage method for determining fee awards in common fund class action litigation.¹¹ Instead, the court held that fee awards in such cases will be governed by the previously disfavored and widely discarded lodestar method, which focuses not on the risks taken and results obtained but, instead, on the hours billed by the attorneys.¹² Holding that the maximum multiplier available under Florida law was five, the Supreme Court awarded a reasonable attorneys' fee of five times counsel's hourly rate, a figure that computed to approximately \$6.5 million.¹³

This Article addresses the Florida Supreme Court's rejection of the percentage method and adoption of the lodestar method. It traces the development of those doctrines and outlines the strengths and weaknesses of each method. It then examines the effect the lodestar method will have on attorneys presented with contingent common fund litigation and concludes that the public will be ill-served by the court's departure from precedent.

II. THE COMMON FUND DOCTRINE

It has been well settled since at least 1881 that when attorneys generate a common fund for the benefit of a class, their fees should be paid by the class members.¹⁴ Florida courts have long "recognize[d] the rule which permits the award of [attorneys'] fees [to be awarded] 'from a fund or estate which has been benefited by the rendering of legal services.'"¹⁵ Under the "common fund doctrine," attorneys who recover a common fund for the

9. See, e.g., *Woosley v. State*, 838 P.2d 758 (Cal. 1992) (upholding finding that similar tax was unconstitutional but dismissing suit on finding that taxpayers could not use class action mechanism to seek refund from the state), *cert. denied*, 508 U.S. 940 (1993); *Bailey v. State*, 412 S.E.2d 295 (N.C. 1991) (requiring taxpayers to exhaust administrative remedies), *cert. denied*, 504 U.S. 911 (1992); *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167 (1990) (holding that where a decision breaks new constitutional ground, a state may in certain instances deny retroactive relief); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (noting inconsistency in Commerce Clause holdings).

10. *Kuhnlein*, 646 So. 2d at 717.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881).

15. *Fidelity & Casualty Co. v. O'Shea*, 397 So. 2d 1196, 1198 (Fla. 2d DCA 1981) (quoting *Estate of Hampton v. Fairchild-Fla. Constr. Co.*, 341 So. 2d 759 (Fla. 1976)).

benefit of persons other than themselves are entitled to a reasonable attorneys' fee from the fund as a whole.¹⁶ The common fund doctrine plays a crucial role "in vindicating the rights of individuals who otherwise might not consider it worth [their while] to embark on litigation in which the optimum result might be more than consumed by the cost."¹⁷ Courts have recognized that the common fund method is particularly appropriate in cases in which a governmental body has collected an unconstitutional tax.¹⁸

Beginning in the nineteenth century, courts confronted with a petition for attorneys' fees in common fund cases have awarded a fee based upon a reasonable percentage of the common fund.¹⁹ Indeed, fee awards based on a percentage of the common fund are supported by precedent from tax refund cases dating from at least the Civil War.²⁰ Historically, the entitlement to a percentage of the common fund stems from the court's equity power to utilize the doctrines of quantum meruit and unjust enrichment.²¹ Courts have employed a variety of factors to set the reasonable percentage, the most common of which have been the risks of the litigation, the quality of counsel, and the "size of the fund or . . . benefit produced for the class."²² The other factors courts sometimes examine include the novelty and difficulty of the legal issues, the preclusion of other employment, the customary fee, the quality of counsel and the effort expended, the undesirability of the case, and the nature and length of the professional relationship with the client.²³

In the 1970s, however, the United States Court of Appeals for the Third Circuit held that the percentage method did not produce rational and consistent results in "fee-shifting" litigation.²⁴ In that litigation, a statute required the defendant to pay the prevailing party's attorneys'

16. *O'Shea*, 397 So. 2d at 1196; *City of Miami Beach v. Jacobs*, 341 So. 2d 236 (Fla. 3d DCA 1976); *City of Miami v. Florida Retail Fed'n, Inc.*, 423 So. 2d 991 (Fla. 3d DCA 1982).

17. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).

18. See *Florida Retail*, 423 So. 2d at 991; *Jacobs*, 341 So. 2d at 236.

19. HERBERT B. NEWBERG, *ATTORNEY FEE AWARDS* § 2.02, at 31 (1986); Third Circuit Task Force Report on Court-Awarded Attorneys' Fees, 108 F.R.D. 237, 242 (3d Cir. 1985) [hereinafter *Task Force Report*]; see also *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)) (stating that "the percentage basis method is grounded in tradition").

20. *Frost v. Inhabitants of Belmont*, 88 Mass. 152, 164-65 (1863); see John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 882 n.120 (1975); see also NEWBERG, *supra* note 19, § 2.02, at 31; *Task Force Report*, *supra* note 19, at 242; *Graulty*, 886 F.2d at 272.

21. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) (citing *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881)).

22. *Task Force Report*, *supra* note 19, at 242.

23. *Camden I*, 946 F.2d at 772 n.3; Florida Bar Rule 4-1.5.

24. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (3d Cir. 1976).

fees.²⁵ Since the defendant, and not the common fund, was responsible for paying the prevailing party's reasonable attorneys' fee, the percentage method was unworkable. Thus, the Third Circuit adopted what it termed a "lodestar" method for fee-shifting cases.²⁶ Under the lodestar method, a trial court faced with an attorneys' fee request must first scrutinize the attorneys' time records to determine the reasonableness of the hours spent on each aspect of the litigation.²⁷ The court then must multiply that number by what it finds to be a reasonable rate of hourly compensation for each attorney involved.²⁸ It may then adjust the resulting figure to reflect the contingent nature of the litigation and the quality of the attorneys' work.²⁹

Following the Third Circuit's decision, some courts began indiscriminately applying the lodestar method to both common fund and fee-shifting cases "without any real analysis of the propriety of doing so"³⁰ and even though "[t]he public policy considerations . . . are not obviously identical."³¹ However, there are fundamental differences between fee-shifting cases and common fund cases that warrant different methods for determining attorneys' fees. For instance, an award from the common fund generated by attorneys for a class "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost[s] are unjustly enriched at the successful litigant's expense."³² Because fees in common fund cases are awarded from the predetermined damage recovery rather than from the losing party, such fees are "neither intrinsically punitive nor designed to further any [particular] statutory public policy."³³

Conversely, statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights where such claims often produce only nominal damages or declarations of rights.³⁴ Indeed, application of the lodestar method in fee-shifting cases is often necessary because of the lack of any "fund" from which to base an award of attorneys' fees.³⁵ As one commentator has noted:

25. *Id.* at 162.

26. *Id.* at 168.

27. *Id.* at 168-69.

28. *Id.* at 167.

29. *Id.* at 168.

30. Task Force Report, *supra* note 19, at 251.

31. *Id.* (quoting *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 n.19 (3d Cir. 1984)).

32. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

33. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988).

34. NEWBERG, *supra* note 19, § 2.06, at 39-43; *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

35. Task Force Report, *supra* note 19, at 247.

A major distinction between the nature of statutory and common fund fee awards, however, significantly affects how these contingency risks are reflected in the calculation of a reasonable fee award. Fee awards authorized by statute are payable by a losing defendant whether or not there has been any monetary recovery for the named plaintiffs or for a class, in contrast to common fund fee awards that are payable out of the fund recovered. Because statutory fees are payable to prevailing parties to encourage private enforcement of statutes and deter violations, and because the results obtained are often nonmonetary or modest recoveries, a formula for a reasonable statutory fee award based on a percentage of the recovery is not usually available to the courts.³⁶

Because of the different policies involved in common fund and fee-shifting cases and the difficulties courts encountered in applying the cumbersome and subjective methodology required by the lodestar, the initial attraction of the lodestar method quickly gave way to condemnation. With its unyielding focus on hours billed, the application of the lodestar in common fund cases came under intense and almost universal criticism from courts and commentators alike.³⁷

In light of these attacks, the Third Circuit, the court that gave birth to the lodestar method, formed a task force (Task Force), headed by Professor Arthur Miller and comprised of judges and attorneys, to study court-awarded attorneys' fees.³⁸ The Task Force strongly recommended the wholesale return to the percentage method in common fund cases.³⁹

More specifically, the Task Force found the lodestar method to be a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar."⁴⁰ Echoing the criticisms from courts and commentators, the Task Force identified courtless problems inherent in applying the lodestar method in common fund cases:

- it greatly increases the workload on an already overtaxed legal system;

36. NEWBERG, *supra* note 19, § 1.10, at 17 (citations omitted).

37. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (stating that the lodestar method "tends to increase enormously the cost of the litigation to the defense in fees and to the court in hours it must spend on supervision"); *Feuerstein v. Burns*, 569 F. Supp. 268, 272 (S.D. Cal. 1983) (finding that lodestar method "is criticized for overemphasizing the number of hours expended, and thus allowing counsel to artificially inflate attorneys' fees requests"); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 375 (E.D. Pa. 1976) (same); *Blank v. Talley Indus., Inc.*, 390 F. Supp. 1, 5 (S.D.N.Y. 1975) (same); George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 724-25 (1986).

38. Task Force Report, *supra* note 19, at 237.

39. *Id.* at 242.

40. *Id.* at 258.

- its elements are insufficiently objective and produce results that are not homogeneous;
- it spawns confusion and a lack of predictability in its application;
- it creates a great disincentive for the early settlement of cases and encourages the accumulation of excessive hours by the most expensive attorneys, often at the expense of the interests of the plaintiff class;
- it fails to discourage abuses and delays in the fee-setting process;
- it does not take into account the economic realities of the practice of law;
- it “creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law”; and
- it “is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund.”⁴¹

Noting the “widespread belief that the deficiencies of the [lodestar method] either offset or exceed its benefits,”⁴² the Task Force concluded that, while the lodestar method continued to have some merit in statutory fee-shifting cases, fee awards in common fund cases should be based on a percentage of the fund.⁴³ In the Task Force’s view, the lodestar was appropriate in the fee-shifting context because of the different policies at stake in that context, and because there often is no resulting common fund enabling a percentage method.⁴⁴ The Task Force concluded with the recommendation that, in common fund cases, courts should attempt to institute a percentage fee method so as to avoid the inherent deficiencies with the lodestar process.⁴⁵

The Task Force’s recommendation for the adoption of the percentage method in common fund cases was grounded in its recognition of the tangible advantages such a method offers. For instance, awarding a percentage of the common fund places less of a burden on the attorneys and the courts in determining a reasonable fee award, and it is also less subjective because the court does not have to second-guess attorneys regarding the reasonableness of a particular task or hours expended on it.⁴⁶ It also relieves the already overburdened judiciary of the daunting task of scrutinizing necessarily voluminous attorney time records for the life of the litiga-

41. *Id.* at 246-49; *see also* Camden I Condominium Ass’n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

42. Task Force Report, *supra* note 19, at 246.

43. *Id.* at 245-46.

44. *See* Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988) (discussing the different dynamics in statutory fee cases and common fund cases and agreeing with the Task Force that applying variant fee recovery methods to these two categories of actions will best achieve the differing policy objectives each was designed to further).

45. Task Force Report, *supra* note 19, at 246-49, 256.

46. *Id.* at 242.

tion, a review that often delays the disposition of funds to the plaintiff class.⁴⁷

Also, because of its ease of administration, the percentage method is consistent with the United States Supreme Court's admonition that "[a] request for attorney[s'] fees should not result in a second major litigation."⁴⁸ As one court recognized, if the lodestar method were used in common fund cases, the Supreme Court's plea would be "an unattainable dream."⁴⁹

The percentage method also "remov[es] the inducement to unnecessarily increase hours, prompt[s] early settlement, reduc[es] burdensome paperwork for counsel and the court and provid[es] a degree of predictability to fee awards."⁵⁰ Finally, the sharper focus on the common fund mandated by a percentage method, as opposed to a focus on hours billed, is appropriate because a common "fund is itself a limiting factor on reasonable fees" and is the measure of success.⁵¹

In light of the rampant criticisms of the lodestar method and the advantages of basing a fee award on a percentage of the common fund, the United States Supreme Court has followed the Task Force's recommendations and has *rejected* the application of the lodestar method in common fund cases. In *Blum v. Stevenson*,⁵² the Court noted that attorneys' fees in common fund cases, unlike statutory fee-shifting cases, are "based on a percentage of the fund bestowed on the class."⁵³ The Court's recognition that the percentage method is necessary in common fund cases is consistent with the Court's use of such a method in every case in which it has addressed the computation of a common fund fee award.⁵⁴ Thus, the Court, which has favorably cited the *Task Force Report*,⁵⁵ has never endorsed the use of any other method in common fund cases.⁵⁶

Following the *Task Force Report* and *Blum*, the Eleventh Circuit mandated the percentage method in all common fund cases.⁵⁷ In *Camden I Condominium Ass'n v. Dunkle*, the Eleventh Circuit specifically rejected the lodestar methodology as unworkable and unprincipled and found that

47. See *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

48. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

49. *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

50. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1376 (N.D. Cal. 1989).

51. HERBERT B. NEWBERG & ALBA CONTE, *ON CLASS ACTIONS* § 14.03 (3d ed. 1992).

52. 465 U.S. 886 (1984).

53. *Id.* at 900 n.16.

54. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885); *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 532 (1881).

55. *Evans v. Jeff D.*, 475 U.S. 717, 736-37 n.28 (1986).

56. See *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991); see *supra* note 54.

57. *Camden I*, 946 F.2d at 768.

“[a]fter reviewing *Blum*, the *Task Force Report*, and the foregoing cases from other circuits, we believe that the percentage of the fund method is the better reasoned in a common fund case.”⁵⁸ The Eleventh Circuit held that the lodestar method “shall continue to be the applicable method used for determining statutory fee-shifting awards.”⁵⁹

Numerous courts, including the influential United States Court of Appeals for the District of Columbia Circuit, have followed the Eleventh Circuit’s lead and have required the application of the percentage method in all common fund cases.⁶⁰ Just as in these jurisdictions, the only method previously accepted in Florida for the determination of reasonable attorneys’ fees in common fund cases was the percentage method.⁶¹ For example, in *Tenney v. City of Miami Beach*,⁶² a class of taxpayers successfully sued a municipality for a refund of improperly collected taxes. The trial court applied a percentage of recovery method and awarded the attorneys thirty-three percent of the common fund.⁶³ In affirming the award from the common fund, the Florida Supreme Court found the contractually agreed upon percentage to be reasonable in light of “the amount of the claims, the difficulties encountered, the expense attorneys are forced to incur, and the fact that the litigation ran over a period of four years.”⁶⁴ The Florida Supreme Court concluded that the thirty-three percent award was fully justified by the risk undertaken by counsel:

The liens had to be shown to be illegal. Counsel took a chance on showing this. If they had failed they would have been out their labor and expenses for nothing. They have been out of any compensation for four years, must bear the expense of the litigation and when they get this paid including other charges in the way of income taxes, office expense, etc., the fee will be a modest one for the service rendered.⁶⁵

The Florida district courts of appeal consistently followed *Tenney* in awarding attorneys’ fees from the common fund on a percentage basis.⁶⁶

58. *Ressler v. Jacobson*, 149 F.R.D. 651, 653 (M.D. Fla. 1992) (“In class action suits, where a fund is recovered and fees are awarded by the court from the fund,” *Camden I* and *Blum* require the court to “comput[e] fees as a percentage of the common fund recovered.”).

59. *Camden I*, 946 F.2d at 774.

60. See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); see also *Useton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993) (“[T]his court [has] distinguished common fund cases from statutory fee cases and recognized the propriety of awarding attorneys’ fees in the former on a percentage of the fund, rather than lodestar basis.”); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989).

61. See, e.g., *Tenney v. City of Miami Beach*, 11 So. 2d 188 (Fla. 1942).

62. *Id.* at 188.

63. *Id.*

64. *Id.* at 190.

65. *Id.*

66. *City of Miami Beach v. Jacobs*, 341 So. 2d 236 (Fla. 3d DCA 1976); *City of Miami v. Florida Retail Fed’n, Inc.*, 423 So. 2d 991 (Fla. 3d DCA 1982); *Shlachman v. Mitrani*, 508 So. 2d 494 (Fla. 3d. DCA 1987).

For instance, in *City of Miami Beach v. Jacobs*,⁶⁷ an attorney successfully represented a class of individuals seeking a refund of certain "fire line charges."⁶⁸ The circuit court applied the percentage method and awarded the attorney thirty-seven percent of the common fund in attorneys' fees.⁶⁹ The court of appeals affirmed, and ordered that the attorney receive as a reasonable fee thirty-three percent of the fund.⁷⁰

Similarly, in *City of Miami v. Florida Retail Federation, Inc.*,⁷¹ a group of merchants filed a class action seeking to recover the excess payments of occupational license taxes. The trial court ruled in favor of the merchants, ordered a refund of the tax payments, and awarded attorneys' fees in "a sum equal to one-third of the gross amount of reimbursement for 1980-82."⁷² The Third District Court of Appeal affirmed the attorneys' fee award as reasonable, based on the benefit class members received from the attorneys' efforts.⁷³

In light of *Tenney* and its progeny as well as the universal criticism surrounding the application of the lodestar method in common fund cases, the Florida Supreme Court had never, before the instant case, approved the application of any method other than the percentage method in class action common fund litigation. Indeed, Florida courts had confined the application of the lodestar method to the context in which it belongs—statutory fee-shifting cases—and had awarded attorneys' fees under the percentage method in common fund cases.⁷⁴

For instance, in *Shlachtman v. Mitrani*,⁷⁵ the plaintiff in a successful contract action for specific performance moved for an award of attorneys' fees under the parties' contract. The trial court found the plaintiff's fee request unreasonable and awarded half of the requested fees and costs.⁷⁶ On appeal, the plaintiff contended that the trial court erred in failing to apply the lodestar method.⁷⁷ Agreeing with the defendant's assertion that the lodestar pertained only to statutory fees, the court of appeals found that "until such time as the supreme court makes it clear that the 'lodestar' method is to be used in any fee awards, its application should be so limited."⁷⁸

67. 341 So. 2d at 236.

68. *Id.*

69. *Id.*

70. *Id.*

71. 423 So. 2d at 991.

72. *Id.* at 992.

73. *Id.* at 993.

74. See, e.g., *Bailey, Hunt, Jones & Busto, P.A. v. Roland Langen, P.A.*, 632 So. 2d 82 (Fla. 3d DCA 1993) (affirming attorneys' contractual fee award of 25% of the common fund in a class action settlement).

75. 508 So. 2d 494 (Fla. 3d DCA 1987).

76. *Id.*

77. *Id.*

78. *Id.* at 495; see 1 JAMES C. HAUSER, ATTORNEYS' FEES IN FLORIDA 31 (1995).

III. THE FLORIDA SUPREME COURT'S DECISION

It was against this legal backdrop that the Florida Supreme Court considered the trial court's award of ten percent of the common fund as a reasonable attorneys' fee for the Impact Fee lawyers. The Florida Supreme Court first observed that the paramount goal in fee setting was determination of an "objective and consistent" fee award because, in its view, an inconsistent and subjective fee award "undermines the confidence of the public in the bench and bar" and "brings the court into disrepute and destroys its power to perform adequately the function of its creation."⁷⁹ It then rejected the percentage method in common fund cases in favor of the lodestar method, which it believed "provide[s] a more consistent and objective structure for determining reasonable fees in common-fund as well as fee-shifting cases."⁸⁰

In the court's view, "objectivity and consistency" in fee setting are best achieved by focusing on the hours billed and the reasonable rates for those hours because such a framework yields a proper underpinning for an objective structure in fee setting.⁸¹ The court stated that "reasonableness is directly related to how the market values legal services for which clients negotiate rates" and found that the lodestar provides an "evidentiary basis" for evaluating such a reasonable fee.⁸²

Rejecting the percentage method, the court found that "to begin the assessment by arbitrarily picking a percentage amount without any reliance on a cognizable structure invites decisions that are nonobjective and inconsistent."⁸³ The percentage method defies objectivity and consistency because "[w]hat constitutes a reasonable percentage may differ from one judge to another depending on each judge's predilections, background, and geographical location in the state."⁸⁴

Additionally, the court rejected the contention that in common fund cases, the lodestar method overemphasizes the time expended by counsel and places too little consideration on the contingency risk and the results acquired for the class.⁸⁵ The court determined that factors such as risks and results are better considered by accepting or adjusting the base lodestar calculation and by allowing multipliers.⁸⁶ In the court's view, multipliers sufficiently enhance the fee award for the risks taken and results ob-

79. *Kuhnlein v. Florida Dep't of Revenue*, 662 So. 2d 309, 313 (Fla. 1995) (quoting *Baruch v. Giblin*, 164 So. 831, 833 (1935)).

80. *Id.* at 312.

81. *Id.* at 313 (quoting *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1149-50 (Fla. 1985)).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

tained and, if capped, "ensure that the enhancement is not so substantial that the fees become excessive and thereby unreasonable."⁸⁷

More specifically, the court held that under certain circumstances, a multiplier was appropriate in common fund cases. Although the maximum multiplier allowed under Florida law in fee-shifting cases was 2.5,⁸⁸ the court set the maximum multiplier in common fund cases at five in order "to place greater emphasis on the monetary results achieved."⁸⁹ In the court's view, such a multiplier was "sufficient to alleviate the contingency risk factor involved and attract high level counsel to common fund cases while producing a fee which remains within the bounds of reasonableness."⁹⁰ Thus, reviewing the evidence presented to the trial court in support of the fee petition, the court found that the hours expended and the rates charged for those hours were reasonable.⁹¹ Without any additional analysis, the court concluded that in light of the attorneys' remarkable and unprecedented success, "class counsel in this case is entitled to the maximum multiplier available," thus yielding a fee of approximately \$6.5 million.⁹²

Justice Kogan, joined by Justice Shaw, dissented in part from the court's decision.⁹³ In their view, the district court should retain the discretion to base the choice between the percentage and lodestar methodologies upon the circumstances of the particular case.⁹⁴ Justice Harding issued a partial dissent in a separate opinion, in which he, too, stated that the percentage method "should remain available to Florida courts confronted with the task of setting reasonable attorneys' fees in common fund cases."⁹⁵ In his view, the appropriate fee in a case such as the Impact Fee litigation would be six percent of the common fund.⁹⁶

IV. A SOLUTION IN SEARCH OF A PROBLEM

The Florida Supreme Court's adoption of the lodestar method in common fund class actions constitutes a sea change not only in the law of attorneys' fees, but also in the law of class action litigation. The court's decision may well encourage strike suits while effectively closing the courthouse doors to many Florida citizens by deterring qualified counsel from undertaking important contingent fee cases, such as the Impact Fee litigation.

87. *Id.* at 314-15.

88. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 834 (Fla. 1990).

89. *Kuhnlein*, 662 So. 2d at 315.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 316 (Kogan, J. and Shaw, J., dissenting).

94. *Id.* at 317-19 (Kogan, J. and Shaw, J., dissenting).

95. *Id.* at 320 (Harding, J., dissenting separately).

96. *Id.* at 322 (Harding, J., dissenting separately).

The decision may also reward the inefficient and punish the productive and result in the needless waste of scarce judicial resources.

The primary flaw in the court's decision can be attributed to the court's adoption of an erroneous factual and legal premise. In the court's view, the overriding goal in fee setting is the need to ensure the respect of the citizenry for government and the judicial system, which the court believed could be achieved only through an "objective and consistent" methodology—a methodology rooted in the number of hours expended.⁹⁷ However, the court's emphasis on ensuring that the citizenry respect the government and the judicial system reflects an ill-conceived response to public opinion and makes for poor law and policy.

A. *Public Policy Favors a Fee System That Is Not Based on the Hours Expended*

The court's assertion that objectivity and consistency are best served by focusing on the hours expended is highly suspect, given that all three branches of Florida government have previously approved of percentage fees in contingent litigation. Indeed, the judicial branch has approved model contracts (which were used in the Vehicle Impact Fee case) that allow for contingent fees of up to forty percent of the recovery.⁹⁸ The Legislature has similarly enacted at least two statutes that contemplate percentage fees in contingent cases equal to, or in excess of, twenty-five percent.⁹⁹ In executing its agreement with thirteen separate law firms to represent the State in the recent Medicaid/tobacco litigation, the Executive Branch has placed its imprimatur on such agreements.¹⁰⁰ If the citizenry's respect for government and the judicial system is served by contingent fees in these contexts, it is difficult to understand why the same should not hold true in class action litigation. Indeed, a majority of other jurisdictions,¹⁰¹ and Florida courts¹⁰² before *Kuhnlein III*, apparently managed to maintain the respect of the citizenry for the government and the judicial system despite their approval of percentage fees in class action cases.

97. *Id.* at 313.

98. Florida Bar re Amendment to Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960 (Fla. 1986); Florida Bar Rule 4-1.5(f)(4)(B)(i) (stating that any fee exceeding the following standards shall be excessive: 1) 40% of any recovery up to one million dollars and 2) 30% of any portion between one and two million dollars).

99. See FLA. STAT. § 409.910(15)(b) (1995) (attorneys' fees in Medicaid/tobacco litigation capped at 30% of common fund); *id.* § 768.28(8) (permitting negligence statutes fees as high as 25%).

100. *Id.* § 409.910(14)(b) (attorneys' fees in Medicaid/tobacco litigation capped at 30% of the common fund).

101. See *supra* note 58.

102. *Tenney v. City of Miami Beach*, 11 So. 2d 188 (Fla. 1942); *City of Miami Beach v. Jacobs*, 341 So. 2d 236 (Fla. 3d DCA 1976), *cert. denied*, 348 So. 2d 945 (Fla. 1977), and *cert. denied*, 434 U.S. 939 (1977).

As a policy matter, the decision to apply the percentage of recovery method to all common fund cases, including taxpayer class actions, makes tremendous sense. In this country, we generally compensate individuals for the results obtained, not for the number of hours expended and resources devoured. As one court noted, while applying a percentage method in a similar case:

Where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.¹⁰³

In fact, a major incentive for competent counsel to accept class action representation, where the prospect of success is highly uncertain and the potential for significant work is high, is the possibility of a large fee as the resulting benefit to a substantial number of persons. This is a normal and necessary component to any risky investment in the free enterprise system; it has always been encouraged, not discouraged, by public policy.

There are numerous instances in which compensation considerably beyond that justified solely by the time investment is realized because of the large number of persons willing to pay relatively small amounts of compensation in return. Many examples can be found, for instance, in the entertainment and sports industry. Legal services are of no less significance than athletic and entertainment performances; lawyers who achieve virtuoso performances and provide value to thousands of class members should be compensated no differently.

More specifically, the court's decision is based essentially on the mistaken factual premise that an hourly based system reflects the customary market rate for legal services in contingent class action litigation. It fails to recognize that class action litigation is a form of contingent litigation with no recovery without victory; it is no different from a personal injury suit in which attorneys routinely demand, and receive, a one-third percentage of the recovery in exchange for the risks they assume in such litigation. It is precisely because class action litigation is contingent fee work that the courts have found the percentage method most closely approximates the manner in which attorneys are compensated in the marketplace.¹⁰⁴ Contin-

103. *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 631 (D. Colo. 1976) (quoting Hornstein, *supra* note 37, at 660).

104. The percentage method thus more accurately reflects the economics of litigation practice which, "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (quoting *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (finding that percentage approach most closely approxi-

gent recovery cases simply are not undertaken under any form of hourly basis, both because the client cannot afford to pay such a rate and also because the attorney demands a greater reward for the risks that are being taken.

B. Abusive Strike Suits May Receive a Boost Under the Majority's Opinion

The court's assertion that the lodestar method will ensure objectivity and consistency is premised on the belief that the lodestar will produce smaller fee awards than the percentage method. Although this was true in the Impact Fee litigation, in many cases the award will be larger, not smaller. Indeed, there are a large number of class action lawsuits that, unfortunately, fall into the category of "strike suits." These strike suits are brought against "deep-pocket" defendants in the hope of forcing a settlement through threat of publicity, liability (however remote), and significant consumption of time for the companies' senior executives. Most of such suits are brought and settled with the putative class members receiving little in settlement, but with the class action lawyers achieving substantial attorneys' fees because they purportedly have spent thousands of hours advancing their dubious claims. It is for this very reason that many corporations (which are typically the defendants) have lobbied extensively in Congress for litigation reform and the reason for which they are pressing for percentage recoveries in class actions.¹⁰⁵ The percentage recovery is viewed as a method to stymie strike suits because attorneys will be compensated only for achieving results, not for billing hours.

Furthermore, the percentage method removes any incentive to increase hours unnecessarily and is far less burdensome on the parties and the court. As one commentator noted:

If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be

mates the manner in which attorneys are compensated in the marketplace for these types of cases); *Steiner v. Hercules, Inc.*, 835 F. Supp. 771, 792 (D. Del. 1993) (stating that "percentage method is widely used in the legal marketplace in contingent fee agreements and better reflects what a client, at the outset of the litigation, is willing to pay").

105. See 27 Fed. Sec. L. Rep. 116-117 (Jan 20, 1995) (noting that Representative Edward Markey (Dem. Mass.) introduced the Securities Reform Bill (HB 555) that would mandate that fees be calculated on the percentage of funds recovered, rather than on how many billable hours the lawyers generated, "[to] assure that the interests of the plaintiffs' attorneys are more closely aligned with the interests of their clients."). Similarly, the "Private Securities Litigation Reform Act" (SB 240) sponsored by Senators Peter Domenici (Repub. N.M.) and Christopher Dodd (Dem. Conn.) also contains a provision requiring that the courts tie an award of attorneys' fees directly to the amount recovered by investors. *Id.* The final bill, styled "Private Securities Litigation Reform Act of 1995," as approved by the Committee of Conference, provides for the recovery of attorneys' fees based upon a "reasonable percentage" of the amount recovered for the class. See HR Conf. Rep. No. 104-369, 104th Cong., 1st Sess. (1995).

given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a “deregulatory” reform because it relies on incentives rather than costly monitoring. Ultimately, this “deregulatory” approach is the only alternative to converting the courts into the equivalent of public utility commissions that oversee the plaintiff’s attorney and elaborately fix the attorney’s “fair” return.¹⁰⁶

In contrast, under the lodestar method, attorneys litigating such cases will need to log sufficient hours to make the case profitable. The court’s decision creates a great disincentive for the expeditious resolution of cases, as any attorney facing the limited recovery imposed by the lodestar is encouraged to run up hours in order to make the case economically feasible. Courts have criticized the lodestar method “for overemphasizing the number of hours expended, and thus allowing counsel to artificially inflate attorneys’ fees requests.”¹⁰⁷ The end result is a drain on the state’s judicial system and the defendants that bear the brunt of ill-conceived discovery motions, trials, and appeals.

C. Conversely, Individuals Seeking To Challenge State Actions May Find the Courthouse Door Closed

With attorneys given the economic motive to “run the meter” for years against those defendants likely to settle at the end of the game (*i.e.*, major corporate defendants), many individuals with claims to press against the government and other, more recalcitrant defendants will face significant hurdles to obtaining representation. Indeed, the majority’s opinion may have largely closed the courthouse doors to many class actions against the State because an attorney considering such an action must enter into the lawsuit knowing that 1) the state has unlimited resources and will litigate the action for years; 2) if the case challenges a state statute, the Attorney General usually cannot settle the case, and the only way of prevailing is to take the case to judgment and through appeals; and 3) the attorney has no idea whether or how much he or she will be compensated for the risk even if the attorney prevails.¹⁰⁸

Indeed, the court’s decision in the Impact Fee litigation provides little guidance to a trial court in setting fee awards and deciding what the multiplier should be. Under the court’s lodestar methodology, a trial court

106. Coffee, *supra* note 37, at 724-25.

107. See Feuerstein v. Burns, 569 F. Supp. 268, 272 (S.D. Cal. 1983).

108. The Florida Supreme Court’s adoption of the lodestar in common fund cases turns class actions seeking a refund of taxes into a disfavored subset of class action suits. Since the federal Tax Anti-Injunction Act, 26 U.S.C § 7421(a) (1988), bars the filing of suits in federal courts to challenge the constitutionality of state taxes where the state provides a plain and speedy remedy, attorneys representing putative class representatives in taxpayer refund actions will be condemned to state court and to a lodestar recovery.

could award a fee that is many times that awarded by another court in a similar situation. In contrast, under the percentage method, it is unlikely that awards will vary by such a magnitude. Although the particular percentage awarded will vary depending upon the trial court's exercise of its discretion, the results achieved and the risks taken are fairly objective standards which should (and, indeed, have) brought about consistent results.

The court's assertion that the possibility of a multiplier is sufficient to ensure competent counsel in common fund class action cases, such as the Impact Fee litigation, is dubious at best. The court's decision does not guarantee a fee in any way commensurate with the risks. Unlike attorneys undertaking contingent representation in other cases (for example, personal injury attorneys), class counsel will no longer be able to evaluate the time and risks involved and reach an agreement with the class representatives as to the appropriate percentage recovery for undertaking that risk. Instead, an attorney undertaking a class action case must include in his or her calculus the real possibility that, even if successful in litigating the case to judgment, the attorney will be subject to a "lodestar" inquiry into the appropriateness of the hours and the multiplier to be employed. Depending upon the time required and risks involved, a multiplier of two or three may not warrant undertaking many cases—including the Vehicle Impact Fee litigation. In light of the time and financial commitment that complex litigation demands, it is unlikely that counsel will be willing to take cases unless the prospects of prevailing are great or the likelihood of obtaining the highest available multiplier is real.

Under these circumstances, the willingness of counsel to embark on broad class representation will likely be diminished—especially in taxpayer class actions which are complex, hotly contested, and involve a high risk of nonpayment for very substantial hours and costs expended. Yet, this is precisely the type of lawyering the common fund fee award is designed to promote. As the court noted in *Johnson v. Georgia Highway Express, Inc.*,¹⁰⁹ an attorney "should not be penalized for undertaking a case which may 'make new law.' Instead, he should be appropriately compensated for accepting the challenge."¹¹⁰

Without the prospect of a reasonable fee, individuals who have small amounts at stake, such as the \$295 in the Impact Fee litigation, will not be able to find counsel to accept the representation; they will find it economically unfeasible to pursue such litigation individually.¹¹¹ As former

109. 488 F.2d 714 (5th Cir. 1974).

110. *Id.* at 718.

111. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (recognizing that litigation over small individual claims would be prohibitive without class action mechanism); *Hawkins v. Thorp Loan & Thrift Co.*, No. 85-6074, 1992 WL 589727 (D. Minn. Feb. 21, 1992) (finding nonmonetary benefit of establishing incentives for such cases to be filed in future sup-

Chief Justice Barkett so poignantly noted, "Without the contingency fee system, the vast majority of our citizens would be unable even to enter the arena, much less to fight evenly against those who, knowing their advantage, would (by virtue of human nature alone, never mind malice or bad motives) not hesitate to press it."¹¹²

The end result of the court's adoption of the lodestar method could be that systemic and far-reaching wrongs, such as those perpetrated by the State of Florida in the Impact Fee litigation, will go unchallenged and thus result in a society in which the deprivation of fundamental constitutional rights is permitted to continue. Certainly, public respect for the judicial system is not fostered when the average citizen is denied access to that system in order to right everyday wrongs and when elected public officials face no real deterrent to enacting unconstitutional laws.

V. CONCLUSION

Since the founding of our nation, state legislatures have enacted tax statutes infringing upon the constitutional rights of their citizens, as well as those of citizens of other states. Because the amount at stake for an individual taxpayer often is too insignificant for the taxpayer to justify an individual lawsuit, the primary vehicle for challenging unconstitutional tax statutes has been the class action. Attorneys confronted with the prospect of representing such a class will only undertake such a representation when the efforts and risks are justified by the possibility of a sizable reward. By virtually negating the possibility for an attorney to recover a substantial fee award and thus creating a strong disincentive to undertake such litigation, the Florida Supreme Court's adoption of the hours-based lodestar method effectively closes the courthouse doors to the citizens of the state. With fewer lawyers willing to take these cases and, thus, fewer cases being brought, state legislatures across the country will feel freer to enact laws that cross the constitutional line. The end result will likely be a society in which lawyers are deterred from filing suits to right constitutional wrongs and in which legislatures are encouraged to enact such laws in the first place.

ports large fee award); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050-51 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973).

112. Florida Bar re Amendment to Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960, 969 (Fla. 1986) (Barkett, J., concurring in part, dissenting in part).