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Impact of Contingency Fee Agreements on "Reasonable" Attorney Fees Awarded Pursuant to Wisconsin Fee-Shifting Statutes

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IMPACT OF CONTINGENCY FEE AGREEMENTS ON "REASONABLE" ATTORNEY FEES AWARDED PURSUANT TO WISCONSIN FEE-SHIFTING STATUTES

I. INTRODUCTION

Disputes relating to attorney fees pursuant to fee-shifting statutes can often overshadow the substantive merits of a case, given the amount of time courts must dedicate to determining "reasonable" attorney fees at both the trial and appellate levels.[1] This determination can be a daunting task, often requiring judges to scrutinize detailed time sheets, affidavits, testimony, and studies indicating hourly rates for similar work.[2]

In the absence of a fee-shifting statute, each party is responsible for paying its own attorney fees[3] because Wisconsin adheres to the American Rule.[4] There are exceptions to this Rule; for example, where the legislature enacts fee-shifting statutes entitling the prevailing party to collect attorney fees under specific conditions or where courts invoke their equitable powers to make the prevailing party "whole."[5] In either

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1. See GEOFFREY C. HAZARD, JR., THE LAW AND ETHICS OF LAWYERING 522–28 (3d ed. 1999) (citations omitted), for a discussion of the American Rule and court-awarded attorney fees pursuant to fee-shifting statutes:

> Determining attorney's fees is difficult and tends to be hotly contested. A great deal of wasted effort—peripheral litigation not involving the merits—is involved in making an attorney fee award in every case unless, as in most foreign countries, relatively arbitrary amounts are awarded automatically. . . . Calculation of a "reasonable fee" under such statutes has consumed innumerable hours at the trial court level, generated a formidable number of appellate court decisions and occasioned much comment in legal journals.

Id. at 523, 525. Wisconsin courts have had their fair share of disputes relating solely to what constitutes "reasonable" attorney fees. See generally *Stathus v. Horst*, 2003 WI App 28, 659 N.W.2d 165 and *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2003 WI App 175, 668 N.W.2d 798, which are discussed *infra* Parts III and IV.

2. Lawrence A. Towers, *Statutory Attorney's Fees*, 62 WIS. LAW. 19, Nov. 1989, at 21.

3. Stelpflug v. Town Bd., 2000 WI 81, ¶ 30, 612 N.W.2d 700, 708 ("Wisconsin follows the American Rule on the award of attorney fees.").

4. *See* HAZARD, *supra* note 1, at 522 ("The American rule is that each litigant must absorb her own litigation expenses, including attorney's fees.").

5. There are also three generally recognized common law exceptions to the American Rule:

situation, the fees awarded should not exceed the contingent fee that the prevailing party has to pay its counsel.

Where fees are awarded pursuant to a "make whole" theory, it is illogical for a court to permit a prevailing party to collect fees from its opponent in excess of the contingent fee that the prevailing party would be actually required to pay its counsel. Instead of making the prevailing party whole, this would create a windfall for the prevailing party and would impose a punitive award against the prevailing party's opponent. It seems inherently unfair to make the "loser" pay more for the prevailing party's attorney than the prevailing party itself has to pay.[6]

Likewise, where attorney fees are awarded pursuant to a fee-shifting statute, the fees awarded should not exceed the contingent fee that counsel is entitled to collect, unless the legislative intent behind the fee-shifting statute was to ensure that attorneys take cases with minimal economic value to advance an important policy, such as the protection of civil rights.[7] Neither the Wisconsin Supreme Court nor the Wisconsin Court of Appeals has explicitly adopted this view—nor has either court rejected it. However, the Wisconsin Court of Appeals has implied in *Stathus v. Horst*[8] that a prevailing party cannot recover attorney fees in excess of a contingency fee agreement when the applicable fee-shifting statute permits recovery of "[a]ll costs of . . . litigation that were reasonably *incurred*."[9]

This Comment focuses on attorney fees awarded pursuant to fee-shifting statutes[10] and suggests that Wisconsin courts interpret the phrase "reasonable attorney fees" in the same manner that the *Stathus* court

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(1) situations in which the parties have provided for fee shifting by contract;

(2) when the losing party has litigated in bad faith; and

(3) the common fund doctrine, applicable when a litigant expends attorney fees in creating a common fund from which others—such as a class of shareholders, trust beneficiaries or the like—may benefit.

HAZARD, *supra* note 1, at 525 (citations omitted). Because this Comment is an analysis of state law, it will focus on statutory exceptions to the American rule.

6. Tetrault v. Fairchild, 799 So. 2d 226 (Fla. Dist. Ct. App. 2001) (Harris, J., concurring).

7. The Civil Rights Attorney's Fees Act of 1976 ("Fees Act"), 42 U.S.C. § 1988 (2003), is a primary example of where a prevailing plaintiff could arguably collect attorney fees in excess of his contingency fee agreement because the "legislative purpose [of the Act] . . . was to ensure that civil rights plaintiffs are provided with competent representation." *See generally* HAZARD, *supra* note 1, at 523–24.

8. 2003 WI App 28, 659 N.W.2d 165.

9. *Id.* ¶ 18 (quoting Wis. Stat. § 895.80(3)(b) (2003)) (emphasis added).

10. The analysis when there is an applicable fee-shifting statute is similar to the analysis when courts award fees under a "make whole" theory.

interpreted "incurred" attorney fees: as limiting the amount a prevailing party can recover, when its fees were incurred under a contingency agreement, to the contingent amount. To that end, Part II discusses Wisconsin's fee-shifting statutes, with an emphasis on those statutes enacted for public policy purposes. Part III discusses the Wisconsin Court of Appeals' decision in *Stathus v. Horst*,[11] where the court interpreted a fee-shifting statute that permits recovery of "incurred" attorney fees. Part IV addresses three questions that arise when Wisconsin courts award "reasonable" attorney fees: (1) How do Wisconsin courts arrive at a "reasonable" amount where fees were not incurred via a contingency agreement, (2) how do Wisconsin courts arrive at a "reasonable" amount where fees were incurred via a contingency agreement, and (3) should the courts' methodology be the same in each situation? Finally, Part V addresses how Wisconsin courts should determine the amount of attorney fees to award where there is an applicable fee-shifting statute, the purpose of the statute is *not* to protect civil or consumer rights, and the fees were incurred via a contingency agreement.[12]

II. WISCONSIN FEE-SHIFTING STATUTES

The Wisconsin Legislature has created many statutory exceptions to the American Rule, making it possible for prevailing parties to recover attorney fees in a variety of situations.[13] These statutes generally have either a procedural or a public policy purpose and typically include language indicating that the prevailing party is entitled to "reasonable attorney fees,"[14] "reasonably incurred attorney fees,"[15] or "reasonable actual attorney fees."[16] Procedural purposes include preventing

11. 2003 WI App 28, 659 N.W.2d 165.

12. Contingency fee agreements are most commonly associated with personal injury suits; however, "[c]ontingent fees are common in tax refund practice, condemnation proceedings, suits challenging wills, debt collection cases and class action suits for damages." HAZARD, *supra* note 1, at 510. Because this Comment focuses on attorney fees awarded pursuant to fee-shifting statutes, the types of contingency agreements this Comment refers to are typically unrelated to personal injury matters (as most Wisconsin fee-shifting statutes are unrelated to personal injuries).

13. This discussion of Wisconsin fee-shifting statutes is modeled in part on Steven P. Means, *Recovering Attorney Fees*, WIS. LAW., Aug. 1995, at 14–17, 62.

14. *See* WIS. STAT. §§ 132.033(2)(d) (2003) (trademark violations), 138.052(12) (2003) (residential mortgage loans).

15. *See* WIS. STAT. § 180.0746(2) (2003) (payment of expenses in shareholder derivative suit).

16. *See* WIS. STAT. §§ 32.17 (2003) (general eminent domain), 46.90 (elder abuse reporting system), 48.236 (holding a child or an expectant mother in custody), 125.33

frivolous lawsuits[17] and enabling prevailing parties to recover up to $500 in attorney fees as costs.[18] Public policy purposes include protecting consumer rights[19] and restoring victims of intentional property damage to their original position.[20]

The majority of Wisconsin fee-shifting statutes were enacted for public policy purposes. For courts to interpret these statutes properly, they must carefully distinguish the legislative intent behind each statute: Was the intent to promote a policy by ensuring that attorneys take cases with minimal economic value—in other words, to use an award of attorney fees as an incentive for plaintiffs and lawyers to bring lawsuits that a rational actor may conclude are not worth bringing based solely on economic value? Or was the intent to ensure that certain types of prevailing parties would be "made whole" or restored to the position they were in prior to the lawsuit? If the legislative intent was the former, the court should be permitted to award attorney fees in excess of the contingent fee, if the court believes that is necessary to carry out the underlying legislative policy. Alternatively, if the legislative intent was only to restore the prevailing party to its pre-lawsuit position, the

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(restrictions on dealings between brewers, wholesalers, and retailers), 134.93 (payment of commissions to independent sales representatives), 135.06 (dealership practices), 610.70 (disclosures of personal medical information).

Whether Wisconsin courts should interpret fee-shifting statutes differently depending on which phrase is used by the legislature has yet to be conclusively decided by the Wisconsin Supreme Court. However, the Wisconsin Court of Appeals has suggested that courts are more limited in the amount of fees they can award when the legislature specifies that the fees must be "incurred." Stathus v. Horst, 2003 WI App 18, ¶ 24, 659 N.W.2d 165, 170. Part III of this Comment addresses the court of appeals' decision on that matter, and Part V analyzes whether the Wisconsin Supreme Court should in fact differentiate among fee-shifting statutes depending on whether the legislature uses the word "incurred" in the statute.

17. WIS. STAT. §§ 814.025, 809.25(3)(c) (2003).

18. *Id.* § 814.04. The introduction to section 814.04 lists nineteen fee-shifting statutes that section 814.04 does not apply to, making it possible for prevailing parties to recover no more than $100 in attorney fees if one of the nineteen fee-shifting statutes applies. For example, section 895.75(3) is listed in section 814.04 as an exception to the $100 rule and provides that a prevailing party who "suffers physical injury to his or her person or emotional distress or damage to or loss of his or her property" as a result of graffiti is entitled to recover "costs, including all reasonable attorney fees and other costs of the investigation and litigation which were reasonably incurred."

After the legislature adopted section 814.04, it continued to create new fee-shifting statutes, but rather than list all of those statutes in section 814.04, it prefaced the new fee-shifting statutes with the language "notwithstanding s. 814.04(1)." For example, section 180.0746(1), which applies to business corporations, states that "[n]otwithstanding s. 814.04(1), [a court may] order the domestic corporation . . . to pay the plaintiff's reasonable expenses, including attorney fees, . . . incurred in the derivative proceeding."

19. Wisconsin Consumer Act, WIS. STAT. §§ 421–427 (2003).

20. WIS. STAT. § 895.80(1) (2003).

court should be limited to awarding the prevailing party no more than its contingent fee.

A. Fee-Shifting Statutes Intended to Ensure that Lawsuits of Minimal Economic Value Are Brought

The idea of actually creating laws to "encourage" litigation may strike lay people as odd; however, litigation is sometimes necessary to protect fundamental rights, especially when a party does not have the resources to hire competent counsel.[21] Therefore, the legislature enacts fee-shifting statutes to provide an incentive for attorneys to take these cases, despite their minimal economic value.[22] This in turn induces persons to abide by the law, as "[t]he risk of having to pay the injured party's fees encourages the calculating actor to conform to the law rather than to risk liability."[23] When public policy fee-shifting statutes are enacted for this purpose, a court could legitimately award attorney fees that exceed counsel's contingent fee to make the cases attractive to lawyers, which will in turn encourage persons to conform their behavior to the law.

For example, the United States Supreme Court stated that Congress's intent in enacting the Civil Rights Attorney's Fees Act of 1976 ("Fees Act"),[24] which entitles the prevailing party to attorney fees, was to induce litigation:

> The intention of Congress [in enacting the Fees Act] was to encourage successful civil rights litigation. . . . "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."[25]

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21. HAZARD, *supra* note 1, at 524 ("[A] one-way fee shifting statute, providing a fee award to prevailing plaintiffs, stimulates the enforcement of the underlying right.").

22. State legislatures have mirrored Congress in this respect: "Congress has enacted more than two hundred fee-shifting statutes to encourage lawyers to provide representation in meritorious public interest litigation as private attorneys general. Many state legislatures have followed Congress's lead and enacted similar statutes." Russell E. Lovell, II, *Court-Awarded Attorneys' Fees: Examining Issues of Delay, Payment, and Risk*, 1999 A.B.A. SEC. STATE & LOCAL GOV'T LAW 1.

23. HAZARD, *supra* note 1, at 524.

24. 42 U.S.C. § 1988 (2003).

25. Blanchard v. Bergeron, 489 U.S. 87, 95–96 (1989) (quoting City of Riverside v.

Similar to the Fees Act, a Wisconsin civil rights statute that prohibits employers from retaliating against migrant workers seeks to ensure that attorneys provide representation to a specific group of plaintiffs, despite that the cases will have little economic value.[26] If a migrant worker succeeds in a suit against his employer under this statute, "[i]n cases of aggravated circumstances, the court may also assess reasonable attorney fees."[27] Considering that this statute seeks to protect migrant workers, a potentially vulnerable class due to language barriers or unfamiliarity with state and federal law, one could reasonably assume that the legislature had several intentions in enacting this fee-shifting statute: (1) to encourage attorneys to represent migrant workers, even if the migrant workers do not have the means to pay them, (2) to encourage and enable migrant workers to bring suit if their rights are violated, and (3) to discourage employers of migrant workers from taking advantage of their employees. Based on these intentions, courts could legitimately award attorney fees that exceed a contingent fee.

Another example of the legislature attempting to "encourage" meritorious litigation is the fee-shifting provision in the Wisconsin Consumer Act ("WCA").[28] The introductory language of the statute clearly states the important policies it aims to protect: "[The] underlying purposes and policies . . . [of the WCA are t]o protect customers against unfair, deceptive, false, misleading and

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Rivera, 477 U.S. 561, 574 (1986)). In *Blanchard*, the United States Supreme Court interpreted the Fees Act as it applies to contingency fee agreements. Plaintiff brought suit for an alleged violation of his civil rights, claiming that a sheriff's deputy beat him. *Id.* at 88. A jury awarded plaintiff $10,000 in total damages and plaintiff sought attorney fees and costs of more than $40,000. *Id.* at 89. The district court awarded him only $7500 in attorney fees, and plaintiff appealed that award. *Id.* at 89–90. The Fifth Circuit reduced the award of attorney fees to the amount plaintiff's counsel was entitled to under their contingency fee agreement. *Id.* at 90. The Supreme Court reversed the Fifth Circuit and determined that "[t]he attorney's fee provided for in a contingent-fee agreement is not a ceiling upon the fees recoverable under § 1988." *Id.* at 96. The Court looked to the legislative intent behind the Act, which stated that "in computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Id.* at 91 (quoting S. Rep. No. 94-1011, at 6 (1976)). In addition, "[t]he purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Id.* at 95 (quoting H. R. Rep., No. 94-1558, at 1 (1976)).

The Wisconsin Supreme Court reached this same conclusion in *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983), where it determined that § 1988 does not intend for a contingency fee agreement to serve as a ceiling for the amount of attorney fees that can be awarded.

26. WIS. STAT. § 103.96(1) (2003).

27. *Id.* § 103.96(2).

28. Wisconsin Consumer Act, WIS. STAT. §§ 421–427 (2003).

unconscionable practices by merchants, [and t]o permit and encourage the development of fair and economically sound consumer practices in consumer transactions . . . ."[29] Furthermore, the Wisconsin Supreme Court has stated that "WCA actions frequently present important legal questions for both the consumer and the creditor which bear on the public policy of consumer protection."[30]

Because protecting consumers is a clear priority of the legislature, courts properly can award attorney fees that exceed a contingent fee to make it possible for consumers to maintain claims under the WCA. In *First Wisconsin National Bank v. Nicolaou*,[31] the Wisconsin Supreme Court held that the WCA did not restrict recoverable attorney fees to those that were "incurred" but rather required recovery of "a reasonable amount for attorney fees" for prevailing consumers.[32] The plaintiffs in *Nicolaou* agreed to pay their attorneys a monthly retainer plus expenses.[33] The attorney fees awarded exceeded the amount plaintiffs ultimately had to pay their counsel under their retainer; however, adequate attorney fees should be awarded to prevailing consumers to induce litigation pursuant to the legislature's intent.[34]

B. Fee-Shifting Statutes Intended to Restore Parties to Their Original Position

Most fee-shifting statutes are not meant to ensure that attorneys represent plaintiffs in cases of minimal economic value. Rather, most fee-shifting statutes are meant to ensure that prevailing parties are "made whole" or restored to the position they were in prior to the lawsuit so that it is possible for "a little guy . . . [to] take on [a] big guy."[35] These types of public policy fee-shifting statutes can be found in a variety of contexts, including derivative suits,[36] patient health care records,[37] trade regulations,[38] interest payments,[39] payment of state

29. Wisconsin Consumer Act, WIS. STAT. § 421.102(2)(b)–(c) (2003).

30. First Wis. Nat'l Bank v. Nicolaou, 113 Wis. 2d 524, 539, 335 N.W.2d 390, 397 (1983).

31. *Id.* at 536, 335 N.W.2d at 396.

32. *See* Stathus v. Horst, 2003 WI App 28 ¶ 21, 659 N.W.2d 165, 170 (citing *Nicolaou*, 113 Wis. 2d at 536, 335 N.W.2d at 396).

33. *Nicolaou*, 113 Wis. 2d at 540, 335 N.W.2d at 398.

34. *Id.* at 539, 335 N.W.2d at 397.

35. Kolupar v. Wilde Pontiac Cadillac, Inc., 2003 WI App 175, ¶ 17, 668 N.W.2d 798, 805.

36. WIS. STAT. § 180.0746(1) (2003).

37. *Id.* § 146.84(1)(b).

38. *Id.* § 134.23(5).

employee attorney fees,[40] and property damage.[41] In these contexts, courts should *not* be permitted to award attorney fees that exceed the prevailing party's contingent fee because the legislature's intent is to restore the prevailing party to its pre-lawsuit position.[42]

III. WISCONSIN COURT OF APPEALS' DECISION IN *STATHUS v. HORST*

Contingency fee agreements commonly are entered into in personal-injury lawsuits; however, the facts of *Stathus v. Horst*[43] provide a good example of a contingency agreement in a nonpersonal injury context. In *Stathus*, the Wisconsin Court of Appeals addressed an issue of first impression in Wisconsin: "Whether a trial court can award attorney[] fees which exceed what was actually 'incurred,' contrary to the clear language" of the controlling fee-shifting statute.[44]

In *Stathus*, defendants sold their house to the plaintiffs and made several intentional misrepresentations relating to the property.[45] As a result, plaintiffs sued and entered into a contingency fee agreement with their counsel.[46] The agreement provided that counsel would receive one-third of any judgment awarded at the trial court level or forty percent of any judgment awarded on appeal.[47] In addition, it contained language indicating that plaintiffs expressly declined to pay their counsel an hourly rate.[48] Plaintiffs prevailed at trial and were awarded $5000 in compensatory damages and $3000 in attorney fees.[49] Defendants subsequently appealed, and the appellate court affirmed that defendants made a misrepresentation but remanded the case to the trial court for reconsideration of the attorney fees "because the trial court's award did not reflect any exercise of discretion."[50]

On remand, the case went before a new trial judge[51] who awarded attorney fees of $22,000, which was $20,000 more than plaintiffs' counsel

39. *Id.* § 16.528(6).
40. *Id.* § 775.11(3) (2003).
41. *Id.* § 895.80(3) (2003).
42. *See* discussion *infra* Part V.
43. 2003 WI App 28, 659 N.W.2d 165.
44. *Id.* ¶ 18.
45. *Id.* ¶ 2.
46. *Id.* ¶ 17.
47. *Id.*
48. *Id.*
49. *Id.* ¶ 2.
50. *Id.* ¶ 3.
51. The original trial judge passed away. *Id.* ¶ 3, n.1.

was entitled to under their contingency agreement.[52] Defendants appealed that ruling.[53] The court of appeals reversed the trial court's award of attorney fees and remanded the matter a second time, instructing the trial court to (1) apply the "rule of limitation imposed" by the controlling fee-shifting statute and (2) apply the standard for "reasonable" attorney fees as outlined in *Standard Theatres, Inc. v. State Department of Transportation*.[54]

A. The Attorney Fees Must Be Incurred

The *Stathus* court adopted the rationale of the Fifth Circuit[55] and looked to the "clear language" of the applicable fee-shifting statute—in this case section 895.80(3)—which states that the prevailing plaintiff may recover "[a]ll costs of investigation and litigation that were reasonably incurred."[56] Based on that language, the court implied that where attorney fees are "incurred" via a contingency fee agreement, the fees awarded should not exceed the contingent fee.[57] In further support of its rationale, the *Stathus* court quoted the Oklahoma Supreme Court, which stated:

> The majority of courts . . . find that the phrase "actually incurred" limits the attorney fees which may be awarded to the client's actual outlay or contractual obligation. These courts reason that use of the term "actually incurred" is clear and unambiguous and that it is intended to define the maximum amount of fees which may reasonably be allowed under such legislative schemes.[58]

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52. *Id.* ¶ 3.

53. *Id.*

54. *Id.* ¶ 25 (citing to Standard Theatres, Inc. v. State Dep't of Transp., 118 Wis. 2d 730, 349 N.W.2d 661 (1984)).

55. *See* Marré v. United States, 38 F.3d 823 (5th Cir. 1994).

56. *Stathus*, 2003 WI App 28, ¶ 18.

57. *Id.* ¶ 24. The *Stathus* court made the following statement in reference to the appellants' argument, which suggests that the court believes that the amount of a contingent fee does serve as the outer limit for attorney fees pursuant to a fee-shifting statute: "They [i.e., appellants] argue that these cases hold that the existence of a contingent fee agreement is not determinative when calculating the award for fees. We are not persuaded." *Id.* ¶ 19, 659 N.W.2d at 169.

58. *Id.* ¶ 23 n.3 (quoting Oklahoma *ex rel.* Dep't of Transp. v. Norman Indus. Dev. Corp., 41 P.3d 960, 965 (Okla. 2001)).

The *Stathus* court's analysis suggests that had the applicable fee-shifting statute used the language "reasonable attorney fees" rather than "reasonably *incurred* attorney fees," the *Stathus* court may have arrived at a different result: The court may have permitted the trial court to award attorney fees in excess of the contingent fee.[59] Because the legislature's intent in enacting section 895.80(3) likely was to restore the prevailing party to its pre-lawsuit position, the court's analysis should not turn on whether the legislature used the word "incurred."

B. The Incurred Fees Must Be "Reasonable"

The *Stathus* court held that the trial court failed to exercise its discretion when awarding $22,000 in attorney fees because the trial court failed to determine whether that fee was "reasonable."[60] The trial judge multiplied an hourly rate of $150 by the number of hours counsel spent on the case, with a discount on those hours spent on the appeal, and then simply determined that the award was "reasonable."[61] The court of appeals stated that a proper exercise of discretion "requires a reasonable inquiry and an examination of the pertinent facts."[62] This necessarily involves the trial judge considering one or more of the eight "reasonableness" factors outlined by the Wisconsin Supreme Court in *Standard Theatres*.[63]

Among the eight factors, the last factor specifically permits the court to take into account whether the prevailing party entered into a contingency fee agreement with its counsel, although the *Stathus* court did not comment on this last factor or explain how it should apply to the case. In the end, the *Stathus* court remanded the matter to the trial court, stating only that "the award must be based on the attorney[] fees

59. The *Stathus* court dismissed an argument made by the defendants that section 100.18 of the Wisconsin Statutes was the controlling fee-shifting statute in the case because the trial court clearly made findings under section 895.80(3). *Stathus*, 2003 WI App 28 ¶¶ 15, 16. Section 100.18(11)(b)(2) states that the prevailing party is entitled to "reasonable attorney fees" and does not require that those fees be incurred. Thus, it is likely that had section 100.18(11)(b)(2) applied, the *Stathus* court would have permitted an award of attorney fees in excess of the contingent fee. Whether Wisconsin courts should take a different approach when awarding attorney fees depending on if the fee-shifting statute specifies that the fees must be "incurred"—as opposed to simply permitting the recovery of "reasonable attorney fees"—is discussed later in this Comment. *See* discussion *infra* Part V.

60. *Stathus*, 2003 WI App 28, ¶ 13.

61. *Id.*

62. *Id.* ¶ 14.

63. *Id.* (citing Standard Theatres, Inc. v. State Dep't of Transp., 118 Wis. 2d 730, 749–50 n.9, 349 N.W.2d 661 (1984)). See discussion of these eight factors *infra* Part IV.

that were actually incurred and that amount must be reasonable."[64]

IV. HOW MUCH IS A "REASONABLE" ATTORNEY FEE?

Almost every fee-shifting statute in Wisconsin stipulates that attorney fees must be "reasonable."[65] This Part of the Comment addresses how Wisconsin courts arrive at "reasonable" fees when the fees were not incurred under a contingency agreement versus when they were incurred under such an agreement. The *Stathus* court provided guidance on this matter when it directed the trial court to "apply the appropriate standards for determining 'reasonableness' set forth in *Standard Theatres*,"[66] which are listed below:

a) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
c) The fee customarily charged in the locality for similar legal services.
d) The amount involved and the results obtained.
e) The time limitations imposed by the client or by the circumstances.
f) The nature and length of the professional relationship with the client.
g) The experience, reputation and ability of the lawyer or lawyers performing the services.
h) Whether the fee is fixed or contingent.[67]

Given that the last of the eight standards is whether the fee is fixed or contingent, one would be correct to assume that Wisconsin courts do, in fact, use the same methodology for determining a "reasonable" fee regardless of whether the fee was fixed or contingent. This must change because of the very nature of contingency agreements: Although attorneys will sometimes receive no compensation for their work (i.e.,

64. *Id.* ¶ 24.

65. *See* statutes cited *supra* notes 14–16.

66. *Stathus*, 2003 WI App 28, ¶ 25.

67. *Id.* ¶ 14 (citing Standard Theatres, Inc. v. State Dep't of Transp., 118 Wis. 2d 730, 749–50 n.9, 349 N.W.2d 661 (1984)).

when they lose), they hope to make up for that lack of payment when they win. Thus, in order for contingency agreements to be viable options for attorneys, courts must permit attorneys to recover fees in the amount of their contingent fee—no more or no less—despite that the fee may seem "unreasonable" for the amount of work they performed in a particular case.

A. Methodology Wisconsin Courts Use to Determine "Reasonable" Attorney Fees

The initial determination of attorney fees is made at the trial court level, and it is within the discretion of the trial court to hold a hearing to determine the amount of attorney fees to award.[68] Appellate courts typically defer to a trial court's determination of reasonable attorney fees because trial courts have the "'advantageous position to observe the amount and quality of the work performed and ha[ve] the expertise to evaluate the reasonableness of the fees.'"[69]

There is no formula for properly arriving at a reasonable attorney fee. Courts will generally first consider "'whether costs could have been avoided by a reasonable and prudent effort.'"[70] Next, courts might "consider whether the final judgment is out of proportion to the attorney[] fees that were generated in the case and whether the resultant verdict justifies the amount of money expended."[71] Courts then refer to Supreme Court Rule 20:1.5, which "lists additional factors that may help a trial court determine the reasonableness of an attorney's fee."[72] These are the eight factors that the *Stathus* court instructed the trial court to consider on remand.[73]

68. Kolupar v. Wilde Pontiac Cadillac, Inc., 2003 WI App 175, ¶ 16, 668 N.W.2d 798, 804.

69. Beaudette v. Eau Claire County Sheriff's Dep't, 2003 WI App 153, ¶ 31, 265 Wis. 2d 744, 765, 668 N.W.2d 133, 143 (quoting Allied Processors, Inc. v. W. Nat'l Mut. Ins. Co., 2001 WI App 129, ¶ 46, 629 N.W.2d 329, 342).

70. *Kolupar*, 2003 WI App 175, ¶ 16 (quoting Aspen Servs., Inc. v. IT Corp., 220 Wis. 2d 491, 499, 583 N.W.2d 849, 851 (Ct. App. 1998)).

71. *Id.* ¶ 16 (citing *Aspen*, 220 Wis. 2d at 497 n.5, 583 N.W.2d at 852).

72. *Id.* (citing Vill. of Shorewood v. Steinberg, 174 Wis. 2d 191, 205, 496 N.W.2d 57, 62 (1993)).

73. *See supra* note 67 and accompanying text.

1. Determining "Reasonable" Fees When Fees Were Not Incurred Under a Contingency Agreement

In *Kolupar*, the trial court awarded "reasonable" attorney fees based principally on the recommendations of a discovery referee.[74] The trial court also stated that the "case was over-tried . . . [and d]iscovery was . . . well over-done."[75] Based on these findings, the trial court awarded $15,000 in attorney fees and costs, significantly less than the prevailing party's $53,000 request.[76] Similarly, in a labor relations case where the prevailing employees requested $14,000 in attorney fees, the court awarded only $9500 in fees.[77] The trial court noted that the amount of requested fees exceeded the amount in controversy in the case.[78] In addition, "the court pointed out that the employees' three attorneys spent 112 hours on the case, much of which was devoted to research and intraoffice conferences," despite the fact that there was not a lot of case law related to the matter.[79]

From time to time, the Wisconsin Supreme Court also becomes involved in fee disputes. It reversed a trial court's award of fees where the trial court did not have sufficient information to determine a reasonable attorney fee.[80] The affidavit the trial court relied on in arriving at a reasonable fee "did not provide sufficiently detailed information concerning who performed legal services, at what rate, for what amount of time, and what services were provided."[81] Therefore, the supreme court reversed the trial court's award and remanded the case for reconsideration of the fees.[82]

2. Determining "Reasonable" Fees When Fees Were Incurred Under a Contingency Agreement

As the following cases will demonstrate, courts apply the same "reasonableness" standards when attorney fees are incurred as a contingent fee. While courts do not explicitly make a distinction

74. Kolupar v. Wilde Pontiac Cadillac, Inc., 2003 WI App 175, ¶ 7, 668 N.W.2d 798, 801.
75. *Id.* ¶ 17.
76. *Id.* ¶ 7.
77. Beaudette v. Eau Claire County Sheriff's Dep't, 2003 WI App 153, ¶ 30, 668 N.W.2d 133, 143.
78. *Id.* ¶ 32.
79. *Id.*
80. Fireman's Fund Ins. Co. v. Bradley Corp., 2003 WI 33, 42, 660 N.W.2d 666, 685.
81. *Id.* ¶ 68.
82. *Id.* ¶ 70.

between the reasonableness of the contingency agreement itself and the reasonableness of the contingent fee amount, it is apparent that a distinction exists. With respect to the fee agreement itself, courts typically refuse to enforce contingency agreements that permit attorneys to recover in excess of fifty percent of the prevailing party's recovery,[83] and many states have "set caps for allowable contingency fees."[84]

However, even if the agreement itself is reasonable—for example, one-third of any recovery—courts still consider the reasonableness of the contingent amount that the attorney stands to recover. The Wisconsin Supreme Court stated in an eminent domain case that "courts should use 'a contingency fee agreement as a guide only and must consider all the circumstances of the case to determine whether the contingency fee amount is a just and reasonable figure,'" including the eight factors listed in Supreme Court Rule 20:1.5.[85] Applying this reasoning, the Wisconsin Court of Appeals upheld a trial court's award of attorney fees, which were equal to the one-third contingent fee that plaintiff's attorney was entitled to under their fee agreement.[86] In arriving at its decision, the court of appeals held that the trial court properly exercised its discretion because it considered the "hundreds and hundreds of hours" that went into the case, the "very, very substantial amounts of money" that the client stood to receive, and the fact that it was "obviously a very, very serious injury case."[87] In addition, the trial court recognized the risks the attorney took in trying worker's compensation cases on a contingent basis:

> I am very well aware of how plaintiff's counsel can come into court after spending hundreds and hundreds of hours, if not thousands in some cases, to be stuck with the costs and no compensation. And [a] one third [sic] contingent fee is not designed to in each and every case specifically compensate the lawyer for the work that had been done on an hourly basis or--

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83. *See* LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, JUDICIAL STUDIES PROGRAM 13 (The Manhattan Institute 1994) ("[C]ontingency fee rates seldom amount to less than one third . . . of recoveries when cases are settled without trial, 40% if cases go to trial and 50% if appeals are necessary to sustain the trial judgments.") (footnote omitted); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 543 (10th ed. 2000) ("A common contingent fee is 30%–40%.").

84. BRICKMAN ET AL., *supra* note 83, at 17.

85. Meyer v. Mich. Mut. Ins. Co., 2000 WI App 53, ¶ 13, 609 N.W.2d 167, 170 (quoting Vill. of Shorewood v. Steinberg, 174 Wis. 2d 191, 204, 496 N.W.2d 57, 62 (1993)).

86. *Id.* ¶ 29.

87. *Id.* ¶¶ 18–20.

> it's a gamble. And sometimes I think lawyers are foolish . . . because it would have been better spending the money in Las Vegas. The odds would have been better maybe.[88]

For courts to apply the eight standards outlined in Wisconsin Supreme Court Rule 20:1.5, it is often necessary to "incorporate customary fixed-fee rates [i.e., hourly rates] into the calculus of reasonableness," despite that the fees were not incurred on an hourly basis.[89] For example, a court awarded attorney fees that were less than the attorney's one-third contingent fee because the court found "the resulting fee under the fee-contract ($813.57 per hour) to be unreasonable."[90] When the court converts the contingent fee to an hourly rate, of course it is going to seem unreasonable. However, there are many factors that go into a contingent fee that are not accurately reflected when courts simply transform a contingent fee into an hourly rate, which is precisely why courts need to adopt a different methodology for determining the reasonableness of contingent fees.

B. Wisconsin Courts Should Use a Different Standard of "Reasonableness" for Contingent Fees

Attorneys who regularly enter into contingency agreements take risks; on a case-by-case basis, they expect to be over-compensated, under-compensated, or not compensated at all. However, they hope that the aggregate amount of fees they collect for their entire portfolio of cases will enable them to make a sufficient hourly rate. Because attorneys voluntarily take a calculated risk when entering into contingency agreements—where the attorney will sometimes collect fees that are extremely high or extremely low relative to the amount of time they spend on a particular case—courts should refrain from scrutinizing whether the contingent amount is reasonable.

If courts were to assess the reasonableness of the contingent fee, conclude that a contingent fee was too low, and award attorney fees in excess of the contingent fee, attorneys would no longer assume the risk of receiving a low contingent fee. As a result, attorneys could recover substantial attorney fees both when there is a low damage award—via

88. *Id.* ¶ 20.

89. Rosquist v. Soo Line R.R., 692 F.2d 1107, 1114 (7th Cir. 1982).

90. *Id.*; *see also* Reed v. State Farm Mut. Auto. Ins. Co., 832 So. 2d 1132 (3d Cir. 2002) (holding that 40% of recovery, which attorney was to receive under his contingency fee agreement, was unreasonable).

court-awarded fees that exceed their contingent fee—and when there is a high damage award—via the contingent fee itself. Alternatively, if courts determine that a contingent fee is too high and award less than the contingent fee, attorneys would be deterred from ever entering into a contingency agreement because they cannot count on those high contingent fee cases to make up for lost cases where they recover no fee.

Instead of assessing the reasonableness of contingent fees, courts should ensure only that contingency fee agreements are procedurally "reasonable." Accordingly, courts should ensure that the agreements are in writing, the client understands that he could have hired his counsel at an hourly rate, and the contingent percentage is not unconscionable or in excess of any statutory cap.[91] Whether the contingent fee the attorney receives at the conclusion of the case is reasonable should not be determined by courts, as lawyers "rely[] on the fact that the vast majority [of cases] will produce a reasonable award, a few will be big winners and another small percentage will be a partial or total loss"[92] and make their fee agreements accordingly.

V. "REASONABLE ATTORNEY FEES" SHOULD NOT EXCEED A CONTINGENT FEE

Where the legislative intent behind a fee-shifting statute is to restore a prevailing party to its pre-lawsuit position, Wisconsin courts should award fees that equal the contingent fee, regardless of whether the statute stipulates that the fees must be "incurred." In other words, when courts interpret fee-shifting statutes that stipulate that the fee must be only "reasonable," and not "reasonably incurred," courts should assume that the phrase "reasonable attorney fees" implies that those fees were actually "incurred." It is unlikely that the legislature intended for prevailing parties to be made more than whole in either situation:

> [T]he purpose of requiring a losing party to pay the winner's attorney fees is to make whole the . . . [party] who is retaliated against for his or her action. Requiring a payment in excess of 100% of the victim's attorney fees does not make a victim whole—it becomes a windfall for the victim or his or her

91. "The Model Rules and Model Code for the most part address procedural fairness—whether a fee agreement is in writing and whether a client is informed of the different options before agreeing to a contingent fee—rather than substantive fairness—whether a fee is excessive." JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 68 (2d ed. 2001).

92. HAZARD, *supra* note 1, at 515.

attorney.[93]

Furthermore, when courts award fees in excess of the contingent fee, the risk inherent in contingency agreements effectively is shifted from the attorneys to the losing party, who is forced to pay an amount of attorney fees that the prevailing party's attorney could not collect from his own client.[94]

Consider Wisconsin Statute section 32.28 as an example: This statute applies to eminent domain matters and permits a prevailing party to recover "reasonable litigation expenses." These expenses are defined in section 32.28(1) as "including reasonable attorney . . . fees."[95] While the statute does not explicitly state that the attorney fees must be incurred, the court should presume that the legislature intended that the fees would be incurred. Accordingly, if a prevailing party had entered into a contingency agreement, he could not collect more than the contingent fee that he owes his attorney under their agreement.

The Wisconsin Supreme Court has implicitly agreed with this analysis by stating that the two purposes of section 32.28 are to "discourage low jurisdictional offers and to make the condemnee whole when the condemnee is forced to litigate in order to get the full value of the property."[96] However, in that same case, the prevailing party had entered into a contingency fee agreement, and the Wisconsin Supreme Court said that the agreement should be a "guide only and [the court] must consider all the circumstances of the case to determine whether the

93. Bd. of Regents v. Wis. Pers. Comm'n, 147 Wis. 2d 406, 415–16, 433 N.W. 2d 273, 278 (Ct. App. 1988) (citing Watkins v. Labor & Indus. Review Comm'n, 117 Wis. 2d 753, 764, 345 N.W.2d 482, 487 (1984)).

94. Attorneys are clearly aware of this possibility and often contract to ensure that they come out on top should a court award attorney fees in excess of the percentage of the award they are entitled to under their fee agreement. Such a contractual provision would state that plaintiffs will pay their counsel a portion of the recovery or the amount of attorney fees awarded by the court, whichever is greater. *See* Tetrault v. Fairchild, 799 So. 2d 226, 232 (Fla. Dist. Ct. App. 2001) (Harris, J., concurring). This type of agreement was labeled a sham by Florida district court Judge Harris, as such a clause does not actually bind the plaintiffs to pay whatever fee the court determines, but rather "mean[s] that the plaintiff and his lawyer can now 'authorize' the court to assess against the defendant a fee greater than the plaintiff would be willing to pay for the same services." *Id.* This does not seem reasonable or fair, and Judge Harris likens it to a "punitive award against the defendant." *Id.* at 235.

95. WIS. STAT. § 32.28(1) (2003).

96. Vill. of Shorewood v. Steinberg, 174 Wis. 2d 191, 207, 496 N.W.2d 57, 63 (1993) (quoting Standard Theatres, Inc. v. State Dep't of Transp., 118 Wis. 2d 730, 745, 349 N.W.2d 661, 670 (1984)).

contingency fee amount is a just and reasonable figure."[97] This is precisely what this Comment suggests courts should not do: It should not matter if counsel is over- or under-compensated in a particular case, for that is the nature of contingency fee agreements. Courts should analyze only whether the agreement itself is reasonable.

VI. CONCLUSION

When Wisconsin courts apply fee-shifting statutes, they should engage in the following analysis: The court should first determine the legislative intent behind the applicable fee-shifting statute. If the intent behind the statute was to protect a fundamental right or promote an important policy by ensuring that attorneys represent plaintiffs in cases with minimal economic value, the court is free to exercise its discretion with respect to what a "reasonable" attorney fee should be.

Alternatively, if the intent behind the statute was only to restore the prevailing party to his position prior to the lawsuit, the court should next consider how the prevailing party paid his attorney. If the prevailing party entered into a contingency fee agreement, then the court should award attorney fees that equal the amount of the contingent fee, regardless of whether the statute requires that attorney fees be "reasonable" or "reasonably incurred." This will ensure that plaintiffs do not receive a windfall at the expense of the defendant as a result of fee awards that exceed the amount plaintiffs actually owe their counsel under their contingency agreements. In addition, making the contingent fee the ceiling for attorney-fee awards will promote judicial economy by making it easier for courts to determine what a "reasonable" attorney fee is.

In summary, when a court awards attorney fees to a prevailing party, pursuant to a fee-shifting statute that was enacted to restore the prevailing party to his pre-lawsuit position, the fees awarded should not exceed the contingent fee actually incurred by the prevailing party. If the fee-shifting statute does not state explicitly that the fees must be "incurred" to be recoverable, Wisconsin courts should interpret the legislative intent behind the statute as implicitly presuming that the fees would be "incurred."

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97. *Id.* at 204, 496 N.W.2d at 62 (citing Hutterli v. State Conservation Comm'n, 34 Wis. 2d 252, 259, 148 N.W.2d 849 (1967)).