IN THE SUPREME COURT OF THE UNITED STATES

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GARY E. GISBRECHT, BARBARA :

A. MILLER, AND NANCY SANDINE, :

Petitioners, :

v. : No. 01-131

JO ANNE B. BARNHART, :

COMMISSIONER OF SOCIAL :

SECURITY. :

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Washington, D.C.

Wednesday, March 20, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ERIC SCHNAUFER, ESQ., Evanston, Illinois; on behalf of the Petitioners.

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. (Pro Hac Vice); on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in case number 01-131, Gary Gisbrecht vs. Jo Anne Barnhart.

Spectators are admonished, do not talk until you get out of the courtroom. The Court remains in session. Mr. Schnaufer?

ORAL ARGUMENT OF ERIC SCHNAUFER

ON BEHALF OF THE PETITIONERS

MR. SCHNAUFER: Mr. Chief Justice, and may it please the Court: We are asking this Court to recognize a simple principle that a federal statute requires that an attorney fee be contingent on success in litigation, that when the court determines an attorney fee pursuant to that statute, an attorney fee should reflect the contingent nature of the fee, thus because 406(b) requires a contingent fee in Social Security cases, when the district court determined the reasonable fee pursuant to 406(b) that attorney fee must reflect the contingent nature of the fee.

QUESTION: Let me ask you a question about the limits of the extent of the prohibition, whatever is in 406(b). I think that can be read to deal only with the question where the attorney is seeking a recovery out of

the plaintiff's recovery.

MR. SCHNAUFER: Yes, Mr. Chief Justice, it's possible to interpret the statute in a way that would not criminalize charging a claimant a noncontingent fee, however the existing practice in the bar is to take it as prohibiting charging a noncontingent fee?

QUESTION: Well, there anything more authoritative as the existing practice of the bar that would lead to that conclusion?

MR. SCHNAUFER: I would direct the Court's attention to the 406(b)(2) where it sets forth the criminal penalties for violation of the statute. There is only one appellate court to address whether or not a noncontingent fee may be charged as the third circuit in Coup, but it doesn't reach the issue. Also one district court in Hutchinson cited in the amicus brief from the claimants representatives addresses that.

No. I think even if the statute did not require a contingent fee when there was no judgment favorable to the plaintiff, I believe that the vast majority of claimants would voluntarily choose to enter into contingent fee agreements.

QUESTION: Because that's how they get counsel?

MR. SCHNAUFER: Absolutely. So even if the statute didn't criminalize charging a noncontingent fee,

this would be the voluntary selection of the vast majority of --

QUESTION: Well, if the statute, 406(b) reads as though when there is a judgment favorable to the claimant, the court may allow a reasonable fee. And could apparently determine that fee any way it saw fit?

MR. SCHNAUFER: I believe this Court's decision in Christenberg Garments is relevant. That case also addresses whether the term, whether the court may award attorney fees interpreting that the court did, the attorney matter wasn't up to the court, that the court would generally award the attorney fee in that fee shifting context. So yes, there are situations in which a different --

QUESTION: Well, it suggests perhaps that the court would allow a fee, but it seems open-ended that it will allow the court to determine the fee any way it wants on the lodestar method or via, by some other method.

MR. SCHNAUFER: Justice O'Connor, I believe the statute should be interpreted relative to the legal context in which it was enacted in 1965, which additional role of state courts rule on contingent fee agreements was to decide where the agreed upon amount between the parties was excessive or abusive.

QUESTION: That wasn't personal to any

statutory mandate, was it? Wasn't that that just the supervisory power of the courts over fees?

MR. SCHNAUFER: Yes, the federal courts in the early '60s, in 1965, doubted whether they even had the authority to rule on the appropriateness of a contingent fee. Congress clarified that by specifically providing 406(b) so the court, the district court would determine the reasonableness of a 406(b) fee. I believe that the --

QUESTION: Well, you think the language of the statute requires a contingent fee? At only reasonable fee can be a contingent fee?

MR. SCHNAUFER: That any attorney fee has to be contingent on success in the litigation that could be different fee agreements. For example, a plaintiff may agree to charge or to pay his or her attorney a flat fee contingent on success in litigation or a specific hourly fee contingent on success in the litigation or for example, a complex formula based on the success in litigation.

But the attorney fee in our view --

QUESTION: But you think that the implication of this statute is that the court has to base it on the agreement of the attorney and the attorney's client?

MR. SCHNAUFER: Yes. I believe the relevant inquiry --

QUESTION: Because it done say that. I think you are reading something in that isn't there. And you are basing that on practice of lawyers at the time or something?

MR. SCHNAUFER: But, Justice O'Connor. I believe that clearly in 1965, Congress could not have intended to adopt for this statute the lodestar method given that the lodestar method had not been invented until a decade or so later and not really adopted by this Court until its decision in --

QUESTION: Well, before lodestar, there were other descriptions for reasonable fees that depended on hours, degree of difficulty, etcetera etc. I mean, lawyers did that for decades.

MR. SCHNAUFER: Yes. Yes, Justice Kennedy, and when a court was involved, the question would be whether the agreed upon fee is reasonable or unreasonable, the court would not itself in the context when there was an existing fee, fee agreement determine what it felt was the most appropriate fee, so the primary question when there is a fee agreement and a fee request is whether the fee request, the agreed upon fee is reasonable.

QUESTION: I think this is a very difficult case because either way, we are going to be, I mean on which circuits involved, we are going to be upsetting

standard arrangements, contingent fees in some cases. In this case, in the Ninth Circuit, are you saying that the fee, the fee the Ninth Circuit set was not reasonable?

MR. SCHNAUFER: Yes, Justice Kennedy. For several reasons the attorney fee that the district courts in Ninth Circuit set was not reasonable. First and foremost, the district courts did not address the primary question whether the agreed upon fee was a reasonable fee. Second, the district court who decided, who ordered the fees in Gisbrecht, Miller and Sandine, did not take into account, did not have the attorney fees reflect the contingent nature of the fee. The district courts awarded in all three cases noncontingent hourly rates, noncontingent fees when by law, the attorney fee must be contingent on success.

QUESTION: Well, but, of course, that assumes that you are correct here. But based on a standard of fair compensation, was this unfair compensation?

MR. SCHNAUFER: Yes.

QUESTION: Quite without reference to your statutory argument?

MR. SCHNAUFER: Yes. Because when an attorney fee is contingent on success in the litigation, the attorney fee should reflect the contingent nature of the fee. In this case, even if there were not a prohibition

on charging noncontingent fee, the parties had freely contracted that the attorney would be paid more taking into account the risk of loss.

QUESTION: But it seems to me you have got to get back to the statute and say why the statute should be read the way you want it to. This isn't an ordinary situation event or of a contingent fee say in a personal injury case which the court may have supervision over in the general sense. Here the court doesn't say that the attorney shall enter into an agreement and the court shall enforce it. It says the court may determine and allow as part of its judgment a reasonable fee for such representation. I think you have got to build from that and say why you think that the amount of the contingencies specified in your contract is the one that the court has to follow.

MR. SCHNAUFER: Mr. Chief Justice, I believe that the practice before 1965 is relevant. Attorneys were entering into contingent fee agreements with their clients to represent full representation in civil actions. Congress in an act in 406(b), did not void those agreements, did not say that attorneys should not charge a contingent fee, but instead, chose to regulate the contingent fee agreements.

If Congress had, if Congress had intended to

prohibit attorneys from engaging, from making contingent fee agreements with their clients, force representation in federal court, Congress really could have said so. I think we have cited.

QUESTION: But it doesn't say anything in (b)(1)(a) about contingent fees, does it?

MR. SCHNAUFER: No. (B)(1)(a) reflects that the attorney be must be contingent upon a favorable judgment.

QUESTION: Well, if you get a favorable judgment --

MR. SCHNAUFER: Right.

QUESTION: You can get a fee.

MR. SCHNAUFER: Yes.

QUESTION: Which isn't quite the same thing.

MR. SCHNAUFER: We believe that the purpose of the statute expressed by Congress is fully implemented by our view.

QUESTION: Let me -- I'm having trouble following your argument. And one reason is because I am using the words differently than apparently you are. I understand we are in a universe where you are only going to get paid under this statute if you win. Am I right about that.

MR. SCHNAUFER: Yes.

QUESTION: All right, so we all assume in that sense every fee is contingent.

MR. SCHNAUFER: Yes.

QUESTION: But then I thought we were trying to distinguish within that universe between some circuits that say the way we should calculate that is by looking to what they call the lodestar, and other circuits that say the way we calculate it is we look to the agreement and if the agreement is for 25 percent of the recovery, that's where we start. Am I right?

MR. SCHNAUFER: Yes, Justice --

QUESTION: All right. Now what is it that we are trying to decide? Are we trying to decide whether -- what is it that you see us trying to decide within that universe?

MR. SCHNAUFER: Well, there are significant variations of the lodestar method. The government now proposes that the lodestar method be the lodestar method from the fee shifting context, not taking into account the contingent nature.

QUESTION: All right. As far as I can see, the Ninth Circuit says we start with the lodestar, but then it can be adjusted for 12 factors. Number six of which is what I would call the contingent fee, namely, the one 25 percent of the judgment written into the contract which is

what I will use the word contingent to refer to, and so you have the Ninth Circuit says first the lodestar adjusted for that, and then some other circuits say first start with 25 percent contingency, but adjust it if that isn't reasonable. Now, that's how I was seeing it. Now, am I right?

Correct me if I'm not.

MR. SCHNAUFER: Justice, I believe there are variations.

QUESTION: And there are some variations, but those are the two basic things. All right. As between those two basic things, what is it you want us to say.

MR. SCHNAUFER: We ask the court to, to specify that when a district court determines a reasonable fee under 406(b) it should start by asking first the question what is the agreed upon amount and is the agreed upon amount --

QUESTION: Okay. You said circuits start with the 25 percent contract and adjust, rather than the circuits that say start with the lodestar and adjust. Okay. And the statute says may. And now why should we do what you want rather than letting the Ninth Circuit free to do it the way it wants?

MR. SCHNAUFER: I believe, Justice Breyer, that there could be possible, you could allow different

circuits to do things in different ways, but the interest is in uniform federal law. I believe that the method, the traditional method of determining contingent fee is best served, best serves the purpose of the act. Hence the lodestar calculation is generally an expensive, time-consuming endeavor best suited to complex litigation. Social Security cases only take generally 30, 40 or 50 hours to accomplish.

If attorney fee litigation using, trying to proof up the Hensley hourly rate is required, then attorneys will have to spend five, maybe 10, in this case much more hours trying to collect a compensatory fee.

QUESTION: Mr. Schnaufer, can I ask you this question? As I understand it, 406(a)provides that for representation before the agency, the agency shall prescribe a maximum fee. Is -- is -- am I correct in that.

MR. SCHNAUFER: Yes. Justice Scalia.

QUESTION: So the agency sets a fee and it doesn't matter what the parties have agreed to before the agency. They can agree to whatever they like. The agency says this is the maximum fee. Why would Congress in B adopt a totally different regime for representation before the courts? As a, you know, before the agency, your agreement with your lawyer doesn't make any difference,

but before the courts basically what governs is your agreement with the lawyer. I don't know why they would do that?

MR. SCHNAUFER: Justice Scalia, I believe that the statute does not say. That the statute does not require the agency to ignore an agreement between a plaintiff or a claimant and his or her attorney when determining a fee for administrative work. In fact, if you take a look at the regulations --

QUESTION: Well, it requires them to ignore it if it goes beyond what the agency determines is the maximum amount that ought to be charged.

MR. SCHNAUFER: Yes, Justice Scalia. In that way 406(b) and 406(a) are the same. To the extent that any agreement between an attorney and the Social Security claimant is inconsistent with the statute provision that agreement is void. The long-standing provision --

QUESTION: What about the provision at the administrative level that does refer to an agreement? This is, what is it, (a)(2), an agreement --

MR. SCHNAUFER: Yes.

QUESTION: It controls with a cap of $4,000 at the agency level.

MR. SCHNAUFER: Yes, Justice Ginsburg. The statute there is elucidative of Congress' acknowledgment

and lass the agency's acknowledgment of the capacity of Social Security claimants to contract with their attorneys for representation in federal court. We are not asking specifically for the court to adopt the presumption, the conclusive presumption in 406(a)(2), instead, we maintain that the attorney has the ability, has the burden as the fee applicant to establish the reasonableness of the fee. That is somewhat different than the more lenient rules of 406(a)(2).

QUESTION: May I ask, just a question of what this fee is composed of. Say the claimant loses at all three levels of the administrator, the administrative level, then wins in court. Do the hours before the agency count and then would they be computed differently because the 406(a) --

MR. SCHNAUFER: Justice Ginsburg, it depends on whether or not the claimant was represented during the administrative proceedings. If the claimant was represented during the administrative proceedings, then the claimant's attorney can apply to the agency for compensation for their services after the --

QUESTION: After winning in court, so they would be completely different.

MR. SCHNAUFER: Yes. They are dual entitlement. The attorney with seek both 406(b) fees from

the court, for the court work, and 406(a) fees from the agency for the agency work.

QUESTION: I believe there is another scheme I think that's more adhered than this Social Security scheme. For veterans' benefits purposes, you are probably familiar with the provision that provides for filing an agreement and then if there is, when they reach such an agreement, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past due benefits awarded. That's an express scheme for filing of an agreement and the agreement enforceable.

MR. SCHNAUFER: Yes, Justice Ginsburg. I believe that Congress does, has addressed specifically on occasion when a court, when the court should look to an agreement or the agency should look to the agreement to determine a reasonable fee. However, I believe that in the context of the legal context in 1965, Congress would have understood that a district court determining a reasonable fee for representation in court for the -- would look first to whether or not there was a contract between the attorney and the claimant and whether or not the agreement upon amount was reasonable. That would be the method by which the judge would be expected to proceed. The judge would not be expected to determine independently a lodestar amount or try to determine a

reasonable fee. If the fee agreed to between the attorney and the client was reasonable, then that fee would be approved.

QUESTION: So you are saying this is a more -- this same statute came later, but that essentially, that they operate the same way?

MR. SCHNAUFER: Yes, but with important differences. The 406(a)(2) administrative fees creates a presumption in favor of the reasonableness of the fee. We are saying that the attorney has the burden under 406(b) to prove the reasonableness of the fee. We are not suggesting that there is any presumption that the fee requested or that 25 percent is a reasonable fee. The attorney has to prove that the reasonable fee is the agreed upon fee. Of course, it's important in many cases the attorney will not request the full agreed upon fee but oftentimes will request much less.

For example, in the case of Anderson that this court denied cert on, the request was not for the full amount of the contract, but for significantly less. I believe the attorneys have a strong interest in not making, requesting inordinately large fees from the court because one, it would be improper, unreasonable, two, the government would be likely to object, and three, the court would be unlikely to award it and so attorneys generally

are going to make a fee request to the court under 406(b), they are going to be within the raping of reasonableness.

QUESTION: If you place an objection to the lodestar method, you said this becomes a litigation that is embarrassingly longer than the litigation over the client itself.

MR. SCHNAUFER: Justice Ginsburg, our objection to the lodestar method depends on how you, what you mean by the lodestar method. There is a lodestar method using the fee shifting context that is a noncontingent fee. There is also a lodestar method that may allow enhancement for contingency and that would be a fee-shifting context.

QUESTION: The district court here relied on the bar fees in the Portland area, didn't it, for lawyers that have been practicing a certain amount of time?

MR. SCHNAUFER: Yes, Mr. Chief Justice. The hourly rates used were established as noncontingent hourly rates however since the attorney services were contingent on success, an attorney fee awarded at that rate would not be fully compensatory. That when an attorney fee is contingent on success, the attorney fee, a reasonable attorney fee should reflect the contingent nature.

QUESTION: Well, every fee is in a sense contingent on success. I mean, if you lose the lawsuit, you don't charge the same amount as if you win the

lawsuit, whether or not the fee agreement is contingent?

MR. SCHNAUFER: Yes. Mr. Chief Justice. In this case, the government maintained that $125 for one attorney was the appropriate reasonable noncontingent hourly rate, however, the government also concedes that the class-based risk of loss in these cases is two out of three. We have set forth agency's own statistics showing that 1/3 of Social Security plaintiffs end up receiving past due benefits and so on average, an attorney will receive 1/3 of that noncontingent hourly rate if that noncontingent hourly rate is all the compensation that the attorney can obtain.

QUESTION: Mr. Schnaufer, here's my problem with, with your basic argument, which is look at the parties who negotiated a fee in another context, that negotiated fees with what the court begins with. This is not other contexts. All three of the contracts involved in this case provided for a fee of 25 percent of the back benefits, right?

MR. SCHNAUFER: Yes, Justice Scalia.

QUESTION: And there is testimony in this case that that is the universal practice, the universal practice of all the lawyers that represent these kind of, these kinds of clients.

MR. SCHNAUFER: Yes, Justice Scalia.

QUESTION: And that, that 25 percent of back benefits is the maximum allowed by law?

MR. SCHNAUFER: Yes, Justice Scalia.

QUESTION: Now, what, what reason is there to believe that this is a, you know, an honest evaluation by the two parties of what the, of what the lawyers' services are worth? The lawyers are simply going for the absolute maximum that the laws allow. I don't know why we should "approach this" or why Congress would have approached it as cases in which well, you know, after all, the parties struck a deal at the beginning at arm's length and that should be the starting point. This is not that kind of a situation. It is a closed market in which these, these plaintiffs take what the bar gives them. That's about it.

MR. SCHNAUFER: Justice Scalia, I believe that if the statute specified a 5 percent maximum fee or 10 percent maximum fee, the attorneys would also generally charge, almost universally charge that same five or 10 percent. It's important to take a look at the 25 percent cap on past due benefits in relative context. This is 25 percent of past due benefits. It's not 25 percent of the whole value of the case. In normal civil litigation an attorney recovers not 25 percent of a small part of the judgment but the lifetime benefit.

QUESTION: Sometimes it would be a larger part of the benefit. It depends entirely on how long the case goes on. It's entirely fluky, and in all of the cases, the lawyers come in and say 25 percent. That's the max I can get, and that's what I'm going to ask for.

MR. SCHNAUFER: I think that, Justice Scalia, I think in this case it's useful to look at an example and see what that 25 percent cap actually does. The government in this case maintained that the noncontingent hourly rate was $125 per attorney. Also the government does not dispute that the risk of loss is one in three and so a fully compensatory hourly rate would multiply that hourly rate times a three multiplier for $375 an hour. However, in these cases, the actual, the 25 percent cap came in, would have been met at $280, $190 and roughly $270.

QUESTION: But your multiplication assumes a fictitious market. If I'm an attorney and I'm practicing in this area and I know I'm going to win only one out of every three cases, I'm going to tell the judge my hourly rate in order to make a decent level in this part of the law and this special is X dollars an hour, $150 an hour. I have to get that. And I take it the trial judge would say yes, that's right, $150 an hour is the prevailing rate. That's what you get.

MR. SCHNAUFER: Justice Kennedy, I believe the hourly --

QUESTION: You, you, you made the assumption of a, of a fictitious market.

MR. SCHNAUFER: Justice Kennedy, I believe that the government concedes that there is a preloss in a typical Title II case and also the government's position was that the appropriate noncontingent win, lose or draw hourly rate was $125 for one of these attorneys. Therefore, under the government scheme, paying $125 an hour to an attorney for services will only mean that the only grosses only $44, roughly, roughly a third of that amount. And so the way the government is counting, the establishing of the hourly rate at $125, admitting to the class based risk of loss as one of not contesting that, can you see that the attorney's recovery is actually much lower than that noncontingent hourly rate, given the --

QUESTION: Well, it will be --

QUESTION: Let me ask you a question I have been trying to get in for a while here. What would you, what would your reaction be to a rule that says the district judges shall require the applicant for a fee to one, file any contract he has, two, file a statement of his hours, three, file his normal rate that he normally charges and based on the district judge's knowledge of the

proceedings, he shall set a reasonable fee?

MR. SCHNAUFER: Justice Stevens, I believe that that would accomplish the goal readily, a local district court could adopt such a rule which would be consistent in 406(b). I think that the court should also at the same time consider whether or not there is any offsetting award under the Equal Access Justice Act. Also, whether or not there is any fee, fee liability under 406(a).

QUESTION: Well, the district court here expressed, perhaps it was a magistrate judge, expressed some skepticism as to the number of hours, I think, put in on one of these cases.

MR. SCHNAUFER: Mr. Chief Justice, I believe that the district court judge disputed whether there was any special expertise involved. The government did not contest that all the hours in these cases were reasonably spent, the 25 hours, the 39 and the 52 hours.

QUESTION: Well, the fact the government didn't contest it doesn't mean that perhaps we shouldn't pay some attention to the view of the district judge.

MR. SCHNAUFER: The district court judge did award the number of hours requested. The district court judge did not reduce the hours at all in terms of the hours. I'd like to take the rest --

QUESTION: Why should we consider the separate

fee under the equal access to justice act? A reasonable fee is a reasonable fee. Why does it matter that some money may be forthcoming from a different source to pay for it?

MR. SCHNAUFER: The statute concerns how much the client will actually end up paying his or her attorneys that the Equal Access Justice Act --

QUESTION: And it says that they should pay a reasonable amount.

MR. SCHNAUFER: All right. Yes. A reasonable amount. And for example, the out-of-pocket attorneys fees in this case with the EAJA offset was 29,675 for all three claimants who received $114,000 in back benefits. And so in that context I believe that the attorney fees, the judge should consider the equal access to justice act because how much the claimant pays is very important.

QUESTION: How does it work under the fee-shifting --

QUESTION: The equal access to justice fee is for the benefit of the lawyer, rather than the client.

MR. SCHNAUFER: The EAJA itself, the offset provision states that the attorney should keep the larger of the 406(b) and the EAJA fee so the statute itself contemplates that the attorney is entitled to the larger fee.

QUESTION: In the context of a fee-shifting statute where EAJA applies, the lawyer gets the fees from the Defendant under EAJA. Can the lawyer have an agreement with the client that the client is going to pay an override above, above what the lawyer gets from the Defendant?

MR. SCHNAUFER: Yes. We rely quite heavily, Justice Ginsburg, on this Court's decision on Venegas vs. Mitchell, recognizing that an attorney fee paid by a client to his or her own attorney can be in addition to the amount of a fee-shifting statute. A fee-shifting statute such as the EAJA will not provide a fully against tore fee in almost all cases. This is particularly true since the EAJA's hourly rate has an artificial cap. It is not the prevailing market rate based upon the attorney's services in the legal community. If I may, I take the --

QUESTION: Very well, Mr. Schnaufer. Mr. Salmons, we will hear from you.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE RESPONDENT

MR. SALMONS: Mr. Chief Justice, may it please the Court: For three reasons the Court should use the lodestar method to determine and award a reasonable attorney's fee under the Social Security Act. First, the lodestar method best reflects the plain language and

purposes of Section 406(b). Second, it is consistent with the strong presumption in favor of the lodestar approach announced in this Court, attorneys' fees cases and third it best furthers the statute's directive that the fees awarded in each case must be reasonable.

QUESTION: Does the lodestar method take into account the contingent nature of the recovery?

MR. SALMONS: Your Honor, the lodestar method permits district courts to take a number of factors into account in determining the reasonable hourly rate and the reasonable fee under this Court's decision in Dague, however, courts are not permitted to increase what would otherwise be a reasonable fee based on the mere fact that it was contingent.

QUESTION: Would it be a reasonable fee if it included in the hourly rate reference to the fact that there is only a 1/3 success rate? As a judge, I want to practice in this area. I know the area very well. I win only a third of the time, therefore my hourly rate takes into account the fact that I'm going to win only a third of the time and my hourly rate is $200 an hour. Can the district judge accept that?

MR. SALMONS: No, Your Honor. I think under Dague that would not be permissible. This court in Dague --

QUESTION: Then that's a false market the district judge is using in order to award the fee. I don't understand that. And, of course, I see the consistency of your position because if you said yes well then I would say well doesn't the contingency fee do the same thing. So I'm -- but -- I'm concerned about how the district judge can award in effect just $40 an hour.

MR. SALMONS: Your Honor, I think there are at least the three responses to that. First, this Court in Dague rejected the notion that contingency enhancements were necessary in order to determine a reasonable fee in the context of fee-shifting statutes.

QUESTION: What in that case, what statute were we interpreting?

MR. SALMONS: That involved Section 1988, Your Honor.

QUESTION: Yes. Not this one.

MR. SALMONS: That's correct.

QUESTION: Not cases like this where there is a low success rate, and where the language of the statute says a reasonable fee.

MR. SALMONS: Your Honor --

QUESTION: I mean, why isn't the court, why can't the court determine it as it wishes, so long as it finds at the end of the day it's reasonable? An hourly

rate that it enhances somewhat or the risk factor, or even a contingent fee could be reasonable, as long as it doesn't exceed 25 percent. Doesn't this statutory language leave that open?

MR. SALMONS: Your Honor, I think the statutory language is open to this Court and to courts generally to construe a standard that best furthers the purposes of the act. This Court has long held --

QUESTION: Do you think the statute requires that one particular method be selected or does it leave it up to the judge?

MR. SALMONS: Your Honor, it certainly leaves it up to courts. That's true in fee-shifting statutes as well as with this statute.

QUESTION: Well I'm not, I'm not sure that fee-shifting statutes are necessarily an appropriate analogy here because perhaps there is no reason for requiring a Defendant to pay a lot of money because of an arrangement between the plaintiff and his attorney was contingent, and the attorney doesn't win many cases. But I think if you are talking about an agreement between the plaintiff and the client in the actual case, there may be more of a case for it.

MR. SALMONS: Your Honor, I think actually to the contrary in the contempt of fee-shifting statutes this

Court has long recognized that the purpose of those statutes is merely to encourage lawyers to undertake that litigation, and nevertheless, this Court has said that a contingent enhancement is not necessary to provide that extra inducement that a lodestar calculation is adequate and appropriate in striking the balance that Congress intended when Congress only intends to encourage litigation. In this context, by contrast, Section 406(b) is not merely a statute designed to encourage litigation, but is designed to protect Social Security claimants and their awards of back --

QUESTION: I can't understand your position that a reasonable fee must be determined without regards to the realities of the special practice. I just don't understand that.

MR. SALMONS: Your Honor, that, that is simply not our position. It is not our position the courts must be blind to the realities of this practice.

QUESTION: Is one of the realities that you can win only a third of the time?

MR. SALMONS: Well, those numbers obviously vary. Lawyers in this kind of environment are prevailing all of the time.

QUESTION: Let's assume that that is a given in the particular community and in the particular practice.

MR. SALMONS: Yes, Your Honor. I think that one thing that's important to keep in mind is that Congress struck the balance in this statute between protecting claims and encouraging lawyers.

QUESTION: In the case that I put, can the judge or cannot the judge take into account the fact that the attorney is going to win only a third of the time? This is his only practice. This is all he does. He is a specialist.

MR. SALMONS: Your Honor, if what you mean by take into account --

QUESTION: That the hourly rate --

MR. SALMONS: That the court can increase the hourly rate in order to provide a subsidy from prevailing Social Security claimants to losing Social Security claimants, I think that would be inappropriate under this statute and under this Court's decisions in Dague, which although it is a different context, I think the difference is quite strongly in favor of applying the same rule here.

QUESTION: It's not a subsidy. What's a subsidy? I mean the obvious, everybody has the same point. If you say they can only learn $40 an hour, the Social Security people won't be represented or they will pad their hours. Now, I can't believe Congress wanted that. So, so there doesn't seem to be an answer to that,

and Congress used the word may, so may means may. I mean, that's the simple argument.

MR. SALMONS: That is correct, Your Honor.

QUESTION: And it sounds to me so far there is no answer.

MR. SALMONS: The point I was making is that it certainly is available to this Court to set a standard for courts to apply.

QUESTION: If it's available, why wouldn't we do it?

MR. SALMONS: That's what I was trying to address, Your Honor.

QUESTION: All right.

MR. SALMONS: I think the reason why this Court should not adopt a rule that would require the shifting of benefits in effect from successful Social Security --

QUESTION: That's what I asked. What do you mean shifting of benefits? It's not a -- a subsidy is where you take some money and you pay for somebody to do something. I don't see why you call this a subsidy. That's a conclusion. What they are doing here is they are charging what it costs them to provide service to Smith, and it is what it costs because in the absence of this, Smith won't get the service. Nor will Jones and Brown, they are apt to lose. But particularly Smith won't.

MR. SALMONS: But Your Honor, that's not necessarily true. I mean, individual cases, the riskiness of individual cases is going to vary widely.

QUESTION: Smith is paying, Smith is paying for the work done for the two guys who lost.

MR. SALMONS: That's correct. That's exactly right. And that's the way this Court --

QUESTION: One way to word that.

MR. SALMONS: That's the way this Court addressed it.

QUESTION: Okay. Well, why shouldn't we look at it that way?

MR. SALMONS: That same analysis --

QUESTION: But why should we look at it that way since Smith is also paying for what it costs to serve Smith?

MR. SALMONS: Your Honor, I think that the reason this Court should view contingency enhancements in this context as inappropriate is because of the purpose of the statute primarily designed to protect the benefits of successful Social Security claims.

QUESTION: Well but the statute itself speaks, sets a kept, a contingent fee of no more than 25 percent. I mean the statute itself refers to that as a cap.

MR. SALMONS: The statute has -- that's

correct, Your Honor. And the statute has two provisions. One is that it sets an upper bound of a reasonable fee which is 25 percent but more precisely --

QUESTION: That does not suggest that there can never be a contingency factor, does it?

MR. SALMONS: It does not necessarily suggest that, no. What we are talking -- what I think the question as Justice Breyer posed was more an a policy level, why should this Court adopt a rule that would allow those kinds of enhancements and I think one of the reasons why that's inappropriate in this context is because the purpose here is not just to encourage lawyers to take these cases, which was the case in the fee-shifting statutes where this Court said enhancements aren't necessary. The purpose here is to protect claimants and it would be particularly inappropriate --

QUESTION: Well, is the purpose to give fair compensation to members of the bar?

MR. SALMONS: That is, that is a purpose, but I would submit, Your Honor, that in regards to the language we are focusing on of the reasonable fee, that is not the primary purpose. There is a separate provision in 406(b) where Congress addressed the question of the problem of encouraging lawyers to take these lawsuits.

QUESTION: Suppose you had a good friend and he

said I'm going to go into Social Security work. I, I know the area very well. It's going to be my specialty. I'm going to win a third of the time. I'm going to in effect get $40 an hour. Would you advice him to go into that part of the practice?

MR. SALMONS: Your Honor, that would probably depend on what some of his alternatives were. I don't mean that in any sort of derogatory way, but it is not the case that lawyers cannot make a sufficient wage under the lodestar method. It's important to remember that there are at least six circuits who have been applying the lodestar method.

QUESTION: May I ask you in a way what you mean by the lodestar method. I know we have talked about it in a lot of cases, but would it be a satisfactory compliance with the lodestar method in your view of the case if every judge said to every lawyer, file your time sheet with me, I want to know your hours, I want to know your regular charge, and I want to see the contract you have got, and I know a lot about the case, I'll fix the fee. Would that satisfy your view?

MR. SALMONS: Your Honor, that would certainly be a one way to interpret a statute that I think on the text of the statute there is nothing that would prohibit it. I think there are strong reasons why this Court may

want to provide some guidance.

QUESTION: Well, the guidance is --

MR. SALMONS: For federal rules.

QUESTION: You should take into account the hours, the general charge that he makes and the success in the case and whatever contract he has made and then you would know the case, you decide the reasonable fee. And we don't want to have a 10-month argument under lodestar method about what the, you know, one of the things we want to avoid is protracted litigation in these cases, so we want to simplify it. I think you would agree that's desirable?

MR. SALMONS: I do agree that's desirable, but I think the lodestar method is the best way to could that.

QUESTION: And I'm just wondering if what I propose to be a sufficient compliance with the lodestar method to satisfy the government?

MR. SALMONS: Your Honor, I think it would largely be in compliance with lodestar method, although not under this Court's decision in Dague which has prohibited the consideration of contingency enhancements.

QUESTION: Did that, did that prohibition of contingency enhancements apply in the context such as this where it was only legally possible to charge when you win?

MR. SALMONS: No, Your Honor, that was not the

context of 1988.

QUESTION: Might not that make a difference? It's one thing to say well, if you don't, if you don't charge anything for your losing cases, that's your problem. You ought to charge. And we are not going to allow you to conduct that practice and make, make this plaintiff pay for the, for the two who you lost. But when you are in a different context where the only time you can get fees by law is where you win, would we have to pay, would we have to adopt the same rule?

MR. SALMONS: Your Honor, I think this Court should adopt the same rule and it's because the reasons this Court adopted the rule that it did in the context of fee-shifting statutes was not because there was still some possibility that lawyers could negotiate fees even that won on a contingent basis.

QUESTION: What's the government's position, supposing one of the Social Security lawyers has a very wealthy client who feels he is entitled to Social Security as a course he is just like everybody else. He hasn't been paid it, and says to the lawyer, I'll pay you $300 an hour if, for all the work you put on this case because I am determined to get that Social Security. Do you think 406(b) prohibits that?

MR. SALMONS: Um --

QUESTION: He doesn't want to get it out of the judgment at all. He says I'll bill you for it afterwards.

MR. SALMONS: Your Honor, the commissioner does interpret 406(b) to require only contingent fees, that it prohibits a lawyer from charging fees when there is no award of back benefits.

QUESTION: A maximum wouldn't make any sense otherwise. I mean, the maximum is 25 percent of the back pay award. If there is no back pay award, you can charge as much as you like. I mean, that's strange.

MR. SALMONS: We think that in light of, of the terms of 406(b), its purpose is in the structure with, with the provision that would make it in fact a crime to charge more. But the best way to read that is to require that only fees that have been authorized by a court can be charged.

QUESTION: Has the commission ever issued an opinion to that effect?

MR. SALMONS: No, Your Honor. There is no regulation that simply addresses that. To be honest with you, it is not an issue that has really come up because lawyers as the record here again reflects, have a universal practice of entering into fee agreements that say 25 percent contingency at the statutory maximum and their contingent fees so it's just not an issue that comes

up.

QUESTION: So the statute says all fees are contingent and the government says there can be no contingent fees? That's where we are in this case?

MR. SALMONS: No, Your Honor. The statute says the relevant language of the statute says the courts will determine a reasonable fee, and we --

QUESTION: But all fees are contingent on success. In other words, there is some confusion, I think, of what the term contingent fee means. Nobody gets a fee if they lose. At least the secretaries interpreted the statute as long as I know to say that the only time that the lawyer is going to recover is if the plaintiff guess benefits, is that right?

MR. SALMONS: That is correct.

QUESTION: Okay. And then the question is what's, what this provision requires. One just reaction that I had to this picture is well, in tort litigation, the standard is a third of the recovery. And why isn't here, why isn't a quarter of the recovery eminently reasonable considering as was pointed out that the recovery comes only out of the past benefits. No -- nothing out of the future benefits the person is going to get. So what is it about the 25 percent of past benefits? It doesn't just make a whole lot of sense instead of

engaging in what we know from this very case, we'll take as much time as the calculation, as the dispute over the benefits themselves. The litigation here over the fees took as long as the litigation over the claimant's right to benefits.

MR. SALMONS: Your Honor, let me if I may address your last point first. That is to say that the commissioner's experience with the lodestar method in the numerous circuits that apply it is not that it is difficult to apply, but keep in mind, Your Honors, that in most of these cases, the lawyers are also seeking EAJA fees and so the very same court that's going to consider the 406(b) fee claim has already undertaken a lodestar analysis to determine a reasonable number of hours and then the rate is determined by EAJA, but the commissioner's experience is that the lodestar method is not difficult to apply and in the vast majority of cases, certainly in most circuits, the commissioner doesn't object to most of the fee claims because they are reasonable. The courts have determined standards for what reasonable rates are in the relevant prevailing markets.

QUESTION: You mentioned EAJA. One of the problems that I have with that analogy is it works out here that you get EAJA is just about this it. These three lawyers got what, what EAJA permitted. And then

fee-shifting statutes generally you get from the Defendant what EAJA allows you, but then you can have, you can recover more from your own client. Here it works out that EAJA is it and it seems to me something unfair about that.

MR. SALMONS: Your Honor, I think the only thing unfair in that sense is that Congress here has determined that the market for legal services in the Social Security context was failing to carry out the purposes of the Social Security Act, and that lawyers had unequal bargaining power and were charging inordinately large contingency fees --

QUESTION: But those were the days you were talking about 50 percent contingent fees so Congress cut it back to 25, so why -- what --

MR. SALMONS: That's correct.

QUESTION: What -- you just said well, 25 not in every case, maybe only work two hours, it would be unreasonable, but instead of having the judge and the lawyers go through this whole thing, I mean, EAJA is available only if the government's position was not substantially justified, right? It's not automatic.

MR. SALMONS: That's correct. That's correct. It's a standard that course seem to find on a regular basis in these cases, but that is the standard.

QUESTION: Does the government -- I don't know

how it works, but when someone is seeking benefits from the government, government has prevailed all through the agency, loses in court, does the government just sort of concede that the government's position was not substantially justified?

MR. SALMONS: Not necessarily, Your Honor. I think the government lawyers in each case would look at the prevailing circuit law or, of the jurisdiction, would look at the facts of the case and make the determination. In most of these cases, EAJA fees seem to be awarded and the resolution of those fees doesn't take a lot of time.

QUESTION: Well, shouldn't there about, you say you look at the law of the particular circuit. I would think that a concept like was the government's position substantially justified shouldn't be whatever it means in, in 12 different appellate courts.

MR. SALMONS: My point, Your Honor, is just one of the things I think that's keeping, is important to keep in mind in these cases is that they, by their nature, tend to be very routine and so both in terms of awarding EAJA fees and in terms of awarding 406(b) fees, it is not very difficult for courts to develop practices in these cases that, that result in a very expedited process, and that in fact, that is, that is the way the lodestar method is applied and I, and it seems to me, Your Honors, that the

alternative that's being proposed would largely frustrate the purpose that Justice Stevens was identifying of the need for some sort of expedited procedures here. They point to four additional factors that aren't lodestar factors that they think courts should take into account.

Some of the contingency circuits who have adopted some modified contingency rule have added additional factors, including requiring courts to ask whether the claimants had been notified that there were other options other than the 25 percent contingent fee which under the facts of this case we were told the lawyers would never do.

QUESTION: Does the government have any statistics as to how often an award of attorneys fees by a district judge is appealed to the Court of Appeals?

MR. SALMONS: Your Honor, that is, in the context of 406(b) cases?

QUESTION: Yes.

MR. SALMONS: There are no -- the agency does not specifically keep statistics on that, although I did discuss that with the relevant agency personnel and was informed that in fact the agency very rarely seeks an appeal unless the case involves some broader legal principle that the agency determines is important to litigation.

QUESTION: How about the attorney?

MR. SALMONS: I do not have any figures on that, Your Honor.

QUESTION: Mr. Salmons, another question of statistics. We have had the statistic that only one out of three cases is successful. And I take it you have not challenged that. That's one of the arguments that there is something that is really outrageous practice going on and there is a need to enhance for that contingency. What I want to ask is are there any, is there any evidence, statistical or otherwise, to explain why the rate is only one win out of three cases?

One reason might be that, or one description might be that virtually all lawyers who take these cases in fact have the experience of losing two for every one. But another explanation might be that lawyers who can tell the difference between a good case and a bad case win at a very high rate, and that a lot of young lawyers who don't have access to many clients are willing to take long shots and that when you average those two together, you bet the one win out of three cases.

Do we know, do we know which possible description is correct or whether there is some third description that explains the one in three?

MR. SALMONS: Your Honor, I'm not aware of any

statistical or other information that's directly on point, although I could think it is important to keep in mind that the standards of review among other things have a lot to do with the outcome of these cases, and that, and that the general statistics that the courts provide through, for example, the federal judiciary home page that tracks different types of cases in different circuits, for example, shows that there has been dramatic increases in the number of Title II disability lawsuits that are filed initially in district courts between the period of 1990 to 2000. In fact, that they have tripled.

QUESTION: Does that have anything to do with what the rate is because these are all cases that lost at the administrative level, right?

MR. SALMONS: That's correct.

QUESTION: Is there any, any showing that maybe in the prior period, there were more cases winning at the administrative level, therefore fewer getting into the court?

MR. SALMONS: Not that I have seen. In fact, Your Honor, the numbers that I have seen suggest that the percentage of cases that win before the agency has been relatively consistent.

QUESTION: I don't understand the point were you driving at. So what, so they tripled in 10 years, you

know, and the ice cap melted.

MR. SALMONS: I surely don't want to overstate it.

QUESTION: I don't understand what you were driving at. What was the point that you were making?

MR. SALMONS: The point I was attempting to make, Your Honor --

QUESTION: Is this the result of those, of those jurisdictions that have allowed contingency to be considered?

MR. SALMONS: No. Not at all. Your Honor. The point I was trying to make is that there aren't any hard statistics that show how the different legal rules have having an effect on litigants in this context, but the general --

QUESTION: And likewise, I take it there are no statistics on how the different compensation approaches are having an effect?

MR. SALMONS: That's correct. And that's, that's the point I was trying to make, Your Honor. That all that we can tell is that one, the commissioner has not been flooded with complaints in the circuits that applied the lodestar, which is the dominant method and has been for over 10 years.

QUESTION: Do you have any flooded in the other

jurisdictions?

MR. SALMONS: No. My point is that there are, there are, there is no reason to think that the rules are having that dramatic of an effect on the availability of counsel.

QUESTION: Then why don't we leave it alone? Let the judge do it?

MR. SALMONS: That is certainly an option that is before this Court. The government's position is that if the Court is going to address the issue of what standards should be applied, that the best way for this Court to do it is to specify that the lodestar method is the best method, and that includes --

QUESTION: But that is a pretty big swing if you say if the judge can go up to 25 percent if that's reasonable, here what was the percent, the lodestar percent, the lodestar yielded what percent of the past two benefits in these cases?

MR. SALMONS: Your Honor, I don't have that figure. I can tell you that in terms of hourly rates, for example, I --

QUESTION: Wasn't it about half of what the contingency would have been?

QUESTION: Even less, I think.

MR. SALMONS: It varied in the, in the cases.

QUESTION: I think it was under 10 percent.

MR. SALMONS: I think one way to sort of try and track that is that what the claimants lawyers in these cases did was because they recognized they were in a lodestar circuit, they had, they kept the same number of reasonable hours they would use for their EAJA fees which the government did not contest and then they just divided that by the 25 percent figure and came up with an hourly rate. So the hourly rates they sought in these cases ranged from around $180 an hour to nearly $300 an hour.

QUESTION: But those were chopped down by the judge.

MR. SALMONS: That's correct.

QUESTION: Because they were not supposed to, at least this Court, the Court here did it. It took out following this Court's precedent any override for risk of nonsuccess.

MR. SALMONS: That's right, Your Honor. The Ninth Circuit has --

QUESTION: So I'm not talking about the rates that the lawyers asked for, I'm talking about the rates that they got. My concern is this. If you just say well judge, look at the agreement. Look at the hourly rate. You can get swings from one court saying as I think was true here, 7.8 percent to another judge saying in that

very same case 25 percent. That's why I think you have to have a little more control, a little more uniformity.

MR. SALMONS: Your Honor, let me make two points very quickly. One is that when Congress enacted this statute, it recognized not only that lawyers were charging an inordinately large percentage in terms of their contingency fees, but there was an inherent problem with contingency fees because in this context they do not track the value, a reasonable value of legal services. They turn unnecessarily on factors such as the number of dependents and the amount of delay that it takes in order to get the benefits over which time the benefits continued to accrue which just has no bearing whatsoever on the amount, the value of the legal services provider.

QUESTION: Are you recommending that we say let the judge do it, no matter what? Is that the government's position? I thought the government was coming in with a pretty stiff position that it's the lodestar method period.

MR. SALMONS: That is the government's position, Your Honor. We think that the lodestar method. Let me just see if I can, and be very clear.

QUESTION: Your position is that we do not want to subsidize bad suits?

MR. SALMONS: Yes. That is exactly right.

QUESTION: It is not in the best interests of anybody, the country or anybody else, to encourage lawyers to bring bad suits and then get paid for it when they win a good suit, right?

QUESTION: I was wondering if you had spent a lot of time --

QUESTION: This is certainly a way to get lawyers in the good suits.

MR. SALMONS: But, Your Honor, there is no, there is no evidence of that. And in fact the evidence that it does exist is to the contrary. There are six circuits that have been employing the lodestar method for, for decades without any evidence that there is a failure of lawyers who want to take these cases. The lawyers in these cases submitted affidavits that said we, we practice regularly in federal courts in Title II cases and we have been doing it for years and years and that's in the context of lodestar statutes.

QUESTION: Why not make it run the same way the veterans' benefits do? I mean, after all, it's a similar kind of set up. You claim that if it's at the agency, you lose, you come to court, and there it's the agreement is 20 percent, so it's, but that seems to be working fine, right? Where the judge gives the 20 percent.

MR. SALMONS: Your Honor, that would certainly

be an alternative availability to Congress. The difference would be the statutory language would prohibit this Court from adopting a rule that would look primarily to the fee contracts. Congress knows how to write that kind of statute when it wants to. It did so in 406(a)(2). It has not done so here. Another point I would like to make, Your Honor, is that, is that these cases are, as both sides seem to agree, are somewhat unique in that they generally require a very low number of hours. They don't require the same kinds of risk undertaken by the lawyers as other contingent fee cases do.

QUESTION: Well, if that's so then the judge in all the circuits that follow the contingent method would reduce the award. I mean, in one way you are going to start with the lodestar enhance. In the other way you are going to start with the contingent fee reduce it. I guess the simpler is the contingent fee reduce it. I think frankly you don't have to go into the hours.

MR. SALMONS: I disagree, Your Honor, because of the court's experience, the lodestar method, I think that's the most efficient way for courts to determine the fee.

QUESTION: Beyond the record, do you have any statistics on how often contingent fees are reduced in the contingency circuits?

MR. SALMONS: I do not, Your Honor. I do not. One other thing that I think --

QUESTION: Do you have any sort of egregious examples where there was a lot of delay in those circuits just to build up the recovery? Has that turned out to be a problem for the agency anywhere?

MR. SALMONS: Your Honor, the agency has not experienced any particular problem under either of these standards. We do think that the lodestar method as this Court announced it in Dague is the best way to effectuate Congress' intent under the purposes of this statute. I think it's important to keep in mind that Congress has already provided a mechanism to ensure adequate counsel here, and that is the payment out of the back benefit awards directly to the lawyer. That's different than in other contingent fee contexts.

So that Congress was concerned with the need to encourage counsel and it provided a provision to do that. It struck the balance, and then it requires the courts to determine the reasonable fee in each case based on a fair value of the legal services provided and this Court has long held that there is a strong presumption that when Congress says courts determine a reasonable fee, Congress means the lodestar method.

If the lodestar method --

QUESTION: That wasn't even established until Hensley against -- whatever it is. The lodestar got settled around in the circuits in the 1980s. Social Security claims have been going on a long time. Wasn't it standard before, but it was contingent?

MR. SALMONS: Your Honor, courts used a variety of standards before as they did under other fee statutes. The fact that the lodestar method wasn't fully developed didn't prevent this Court from adopting it under the Civil Rights Act of 1964, for example, but prior to the adoption of the lodestar method, it's not the case the courts were routinely deferring to the fee contracts.

QUESTION: Thank you, Mr. Salmons. Mr. Schnaufer, you have two minutes remaining.

REBUTTAL ARGUMENT OF ERIC SCHNAUFER

ON BEHALF OF THE RESPONDENTS

MR. SCHNAUFER: Yes, Mr. Chief Justice. I believe that the government's position is a bold new position. The government has not previously advanced except for in its brief that all circuits are wrong, that even the lodestar jurisdictions are wrong. That no one can, no enhancements for contingencies can ever be permitted and so the agency cannot rely on the experience in the circuit lodestar to say that this method is the preferable method.

Claimants need attorneys. In these cases the government conceded that the agency's position, underlying agency position was not substantially justified without attorneys whose claimants most likely would never receive the benefits that they were due. Justice Stevens, you asked about possibly about the EAJA of lodestar. There are many reasons why the EAJA, Equal Access Justice Act is not the lodestar amount. The EAJA has an artificial hourly rate capped below the prevailing market rate. The EAJA also often represents a settlement of the parties for the risk of litigating the substantial justification issue. And so we cannot rely, just because there is an Equal Access Justice Act award, there is not in the case already a lodestar amount.

Then I guess I think it allows this Court to distinguish easily Dague. Dague should not be applied outside of the fee-shifting context because as its request, a plaintiff should be able to pay his or her own attorney to take into account the risk of loss. Justice O'Connor, I think was asking whether or not contingency could be taken into account by a district court in determining the fee. I believe that if this Court can direct that the lodestar method be adopted to enhance for contingency reflecting the necessary contingent nature of the claim or the court can use a contingent fee method,

there again looking at the contingent nature of the fee, regardless of which way the court goes, the court allows more than one method. I brief that the contingent nature of Social Security cases should be taken into account.

The government describes dependence. The government objects that attorney fee awards would be arbitrarily different based upon the number of dependents. The government lost that issue in Hopkins vs. Cohen in 1968. This Court held in Hopkins the number -- thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schnaufer. The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)