No. 01-131

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, and DONALD L. ANDERSON,

Petitioners,

vs.

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTE

OTHER AUTHORITY

REPLY BRIEF FOR THE PETITIONER

I. The Commissioner Makes Several Tacit Concessions.

The Respondent, the Acting Commissioner of Social Security (Commissioner), opposes granting the petition for a writ of certiorari despite the split in Circuits between the use of the lodestar and contingent fee methods of calculating attorney fees under 42 U.S.C. § 406(b), for attorneys for plaintiffs for benefits under Title II of the Social Security Act.[1] (Br. for the Resp't in Opp'n (Br. Resp't) at 8-19.) Before explaining why the Commissioner's arguments do not justify denying the petition, Petitioners pause and identify several of the Commissioner's tacit concessions that weaken the Commissioner's opposition to granting the petition.

A. The Lodestar Method Will Ordinarily Undercompensate An Attorney For A Title II Plaintiff.

The Commissioner does not dispute that 42 U.S.C. § 406(b)(1) criminalizes charging a Title II plaintiff a non-

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[1] *Compare Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987) (lodestar method); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324 (4th Cir. 1989) (same); *Brown v. Sullivan*, 917 F.2d 189 (5th Cir. 1990) (same); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989) (same); *Gisbrecht v. Apfel*, 238 F.3d 1196 (9th Cir. 2000) (same); *Hubbard v. Shalala*, 12 F.3d 946 (10th Cir. 1993) (same); *Kay v. Apfel*, 176 F.3d 1322 (11th Cir. 1999) (same), *with Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990) (*Wells II*) (contingent fee method); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989) (same); *Rodriquez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (same).

contingent attorney fee. (Br. Resp't at 2 & 12 n.12.) Nor does the Commissioner dispute the common-sense proposition that, as a general matter, an attorney who charges a plaintiff a contingent fee will charge a higher fee than an attorney who charges a plaintiff a non-contingent fee. Further, the Commissioner does not dispute that, in the typical case, the lodestar method of calculating a reasonable attorney fee for the purpose of § 406(b) prohibits an attorney from charging a higher fee reflecting the contingent nature of that fee. Further, the Commissioner does not deny that, in the typical case, the lodestar method of calculating the contingent fee that § 406(b) requires undercompensates an attorney for a Title II plaintiff.[2] Rephrased, the Commissioner tacitly concedes that, in the typical case, the lodestar method of calculating attorney fees under § 406(b) essentially dictates that an attorney for a Title II plaintiff must work pro bono to the extent that the contingent attorney fee that § 406(b) requires does not reflect the contingent nature of that fee.

The Commissioner's tacit concession that the lodestar method ordinarily undercompensates an attorney for a Title II plaintiff is significant. However laudable the goal of pro bono advocacy, when enacting § 406(b), Congress did not mandate that attorneys for Title II plaintiffs should ordinarily be undercompensated. Instead, when Congress limited an attorney fee for a Title II plaintiff to "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits," 42 U.S.C.

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[2] The lodestar method only accounts for the contingent nature of a fee in the unusual case. *See, e.g., Allen v. Shalala*, 48 F.3d 456, 460 (9th Cir. 1995).

§ 406(b), Congress sought to prohibit overcompensation, i.e., "inordinately large fees." S. Rep. No. 404, 89th Cong., 1st Sess. U.S.C.C.A.N. 305, 2062 (1965).

B. As The Purported "Trustee" For Title II Plaintiffs, The Commissioner Is Not Seriously Troubled By The Application Contingent Fee Method In The Second, Sixth, And Seventh Circuits.

The Commissioner has assumed the self-appointed role in this litigation (and in other litigation over attorney fees under § 406(b)) as the "trustee for the benefits claimant."[3] (Br. Resp't at 4 n.3.) As the purported trustee for Title II plaintiffs nationally, the Commissioner must be concerned with the determination of attorney fees for Title II plaintiffs in Circuits utilizing the contingent fee method as well as the lodestar method. Even though the contingent fee method is law in the Second, Sixth, and

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[3] *Compare Wells II*, 907 F.2d at 371 ("Finally, accepting reasonable contingency agreements substantially reduces the anomalous role of the Social Security Administration in first denying benefits to a claimant, and then after losing the case, posing as a protector of the plaintiff, but spending more time and money in order to reduce the fees to be paid to the claimant's attorney."). As a structural matter, the Commissioner's opposition to paying Petitioners' attorneys what Petitioners had agreed to pay Petitioners' attorneys is not purely benevolent. By litigating that attorneys for Title II plaintiffs should normally be undercompensated via the lodestar method, the Commissioner obviously tries to make uneconomic or less economic attorney representation of Title II plaintiffs precisely in those cases in which attorney representation is most needed to overturn erroneous agency denials of benefits.

Seventh Circuits, the Commissioner is not troubled by this rule enough to ask this Court to require nationwide application of the lodestar method. (Br. Resp't at 11.) Instead, the Commissioner remarks that "any unfairness" to plaintiffs in the Second, Sixth, and Seventh Circuits is "ameliorated somewhat by the fact that claimants can generally receive at least what they bargained for." (Br. Resp't at 11.) The Commissioner's relative comfort with the contingent fee method in three Circuits is evidence that, in the Commissioner's view as the purported "trustee" for Title II plaintiffs in those Circuits, the contingent fee method does not cause serious injustice or unfairness. Further, the Commissioner's comfort with the contingent fee method in three Circuits is evidence that § 406(b) itself protects adequately Title II plaintiffs when an attorney fee under § 406(b) is calculated using the contingent fee method.

II. There Is A Significant Difference Between The Lodestar Method And The Contingent Fee Method.

The Commissioner opposes granting the petition to resolve the split in the Circuits between the lodestar and contingent fee methods because the difference between the lodestar and contingent fee methods is not significant enough: "Moreover, the ways in which the two different rules operate in practice, which vary somewhat from circuit to circuit, substantially reduce the actual effect of the difference between the two approaches." (Br. Resp't at 8.) The Commissioner's survey of Circuit law does not justify this conclusion.

The Sixth Circuit employs the contingent fee method. *Rodriquez*, 865 F.2d at 744-47. The Commissioner contends that the contingent fee method in the Sixth Circuit is tempered by the Sixth Circuit's recognition of circumstances in which a plaintiff's agreement to pay his or her attorney twenty-five percent of retroactive benefits should not be enforced. (Br. Resp't at 10.) In the Sixth Circuit, deductions from a presumptive award of twenty-five percent of retroactive Title II benefits "generally should fall into two categories: 1) those occasioned by improper conduct or ineffectiveness of counsel; and 2) situations in which counsel would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." *Id.* at 746 (quoted in part in Br. Resp't at 10). But even after more than a decade of experience with the contingent fee method in the Sixth Circuit, the Commissioner does not allege that such deductions are common. Therefore, the deductions mentioned in *Rodriquez* do not have the practical effect of making the contingent fee method approximate the lodestar method in the Sixth Circuit.

The Seventh Circuit also uses the contingent fee method. *McGuire*, 873 F.3d at 977-83. The Commissioner speculates that the Seventh Circuit "might refuse to enforce" contingent fee agreements "on a routine basis." (Br. Resp't at 10.) For this, the Commissioner notes that attorneys may universally seek twenty-five percent of back benefits as a contingent fee. (Br. Resp't at 10.) The Commissioner further points to the Seventh Circuit's statement that a contract for a contingent fee should not be enforced if, "for instance, there is evidence that the client did not know she could negotiate other terms than

a twenty-five percent contingency. . . . " *McGuire*, 873 F.3d at 981 (quoted in Br. Resp't at 10). Again, there is more than a decade of experience with the contingent fee method in the Seventh Circuit. The Commissioner does not claim that during this decade the Seventh Circuit has found a general problem with enforcing contingent fee agreements. (Br. Resp't at 10.) Nor does the Commissioner assert that attorneys within the Seventh Circuit have been misleading Title II plaintiffs. Further, the Commissioner does not state that he has sought or will likely seek en banc review in the Seventh Circuit of *McGuire*'s contingent fee method.[4] Therefore, there is a significant difference between the Seventh Circuit's use of the contingent fee method and the lodestar method.

Finally, the Commissioner weakly asserts that the contingent nature of a contingent fee under § 406(b) may be considered under the lodestar method itself. (Br. Resp't at 11 (citing *Allen*, 48 F.3d at 460).) Yet, the Commissioner does not seriously maintain that consideration of the contingent nature of an attorney fee under the lodestar method even roughly approximates the attorney fee calculated using the contingent fee method. (Br. Resp't at 11.) Nor does the Commissioner represent that those Circuits that use the lodestar method erroneously fail to give adequate consideration to the contingent nature of an attorney fee under § 406(b). Instead, the Commissioner advocates the lodestar method precisely

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[4] As a related matter, the Commissioner does not state that he has sought or will likely seek en banc review in the Second Circuit of *Wells II*'s contingent fee method. *See Wells II*, 907 F.2d at 369-72.

because it gives much less weight to the contingent nature of an attorney fee under § 406(b). (Br. Resp't at 14-15.)

III. The Question Is Ripe For Review.

Notwithstanding the split in the Circuits, the Commissioner argues against immediate review of the question presented. (Br. Resp't at 8-19.) For this, the Commissioner minimizes the "practical" difference between the lodestar and contingent fee methods. (Br. Resp't at 10-11.) The Petitioners have already criticized that rationale.

While the Commissioner posits that the "trend" in the law is towards the lodestar method, the Commissioner does not maintain that this trend will cause the Second Circuit or the Sixth Circuit to abandon the contingent fee method. (Br. Resp't at 9-10.) And with regard to the Seventh Circuit, the Commissioner does not speculate that it will abandon entirely the contingent fee method. (Br. Resp't at 10.) In other words, a split will remain in the Circuits between those that use the lodestar method and those that use the contingent fee method.

The Circuits have been split for more than a decade regarding whether the lodestar method or the contingent fee method should be used to determine the amount of an attorney fee under § 406(b). There is thus sufficient experience upon which to decide which method is appropriate. Further litigation in the lower courts is not needed to discover the advantages and disadvantages of the two methods. Nor is there any legislation likely to clarify the

intent of Congress. For these reasons, the question presented is ripe for review.

IV. The Question Presented Is Important.

In Fiscal Year 2000, there were about 15,000 civil actions involving benefits under Title II and/or Title XVI of the Social Security Act.[5] Therefore, the question presented[6] is important each year to thousands of plaintiffs and potential plaintiffs for Title II benefits as well as to thousands of attorneys who represent Title II plaintiffs or who might represent Title II plaintiffs.

A plaintiff may proceed pro se, but is obviously better off with skilled attorney representation. The ability of a plaintiff to obtain skilled attorney representation is related, in part, to the compensation an attorney may receive for representing the plaintiff. *See Wells II*, 907 F.3d at 372 ("Thus, accepting reasonable contingency agreements as the basis for a § 406(b) social security fee provides a critical incentive for able attorneys to practice in the social security field and increases the likelihood that a claimant can find an attorney sufficiently committed and skilled to litigate successfully against the government."). If the contingent fee method is the proper method to

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[5] *See Federal Court Management Statistics* (2000), *available at* http://www.uscourts.gov/cgi-bin/cmsd2000.pl.

[6] The question presented is whether, when determining a "reasonable" attorney fee to be paid by the plaintiff to the plaintiff's attorney pursuant to 42 U.S.C. § 406(b), a court may give no effect to the plaintiff's contract to compensate plaintiff's attorney in terms of a contingent fee taking into account the contingent nature of the fee.

calculate attorney fees under § 406(b), this Court should grant the petition to enhance the ability of a Title II plaintiff to obtain skilled attorney representation.

On the other hand, if the lodestar method is the proper method to calculate attorney fees under § 406(b), this Court should grant the petition to ensure the uniformity of law. If Congress mandated that attorneys for Title II plaintiffs be undercompensated – a necessary consequence of requiring a contingent fee but prohibiting routine consideration of the contingent nature of the fee when determining the amount of the fee – then attorneys for all Title II plaintiffs should labor under the same rule however harsh.

CONCLUSION

For the reasons given above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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