SUPREME COURT OF THE UNITED STATES

No. 01–131

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, AND DONALD L. ANDERSON, PETITIONERS *v.* JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 28, 2002]

JUSTICE SCALIA, dissenting.

I do not know what the judges of our district courts and courts of appeals are to make of today's opinion. I have no idea what the trial judge is to do if he finds the fee produced by the ("presumptively reasonable," *ante*, at 1) contingent-fee agreement to be 25% above the lodestar amount; or 40%; or 65%. Or what the appellate court is to do in an appeal from a district judge's reduction of the contingent fee to 300% of the lodestar amount; or 200%; or to the lodestar amount itself. While today's opinion gets this case out of our "in" box, it does nothing whatever to subject these fees to anything approximating a uniform rule of law. That is, I think, the inevitable consequence of trying to combine the incompatible. The Court tells the judge to commence his analysis with the contingent-fee agreement, but then to adjust the figure that agreement produces on the basis of factors (most notably, the actual time spent multiplied by a reasonable hourly rate, *ante,* at 18) that are, in a sense, the precise antithesis of the contingent-fee agreement, since it was the very *purpose* of that agreement to eliminate them from the fee calculation. In my view, the only possible way to give uniform meaning to the statute's "reasonable fee" provision is to understand

it as referring to the fair value of the work actually performed, which we have held is best reflected by the lodestar.[1] See *Hensley* v. *Eckerhart,* 461 U. S. 424, 433 (1983).

I think it obvious that the reasonableness of a contingent-fee arrangement *has to be* determined by viewing the matter *ex ante*, before the outcome of the lawsuit and the hours of work expended on the outcome are definitively known. For it is in the nature of a contingent-fee agreement to *gamble* on outcome and hours of work—assigning the risk of an unsuccessful outcome to the attorney, in exchange for a percentage of the recovery from a successful outcome that will (because of the risk of loss the attorney has borne) be higher, and perhaps much higher, than what the attorney would receive in hourly billing for the same case. That is why, in days when obtaining justice in the law courts was thought to be less of a sporting enterprise, contingent fees were unlawful. See, *e.g., Butler* v. *Legro*, 62 N. H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

It is one thing to say that a contingent-fee arrangement is, *ex ante*, unreasonable because it gives the attorney a percentage of the recovery so high that no self-respecting legal system can tolerate it; the statute itself has made

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[1] The Court finds it "unlikely," *ante*, at 16, that 42 U. S. C. §406(b) (1994 ed. and Supp. V), enacted in 1965, contemplated application of the lodestar method that the courts had not yet even developed. Of course it did not. But it *did* contemplate an *ex post* determination of a reasonable fee for an attorney's work—which our post-1965 cases have held is best achieved by using the lodestar. We have not hesitated to apply the lodestar method to other fee statutes enacted before the method was developed. See*, e.g.*, *Burlington* v. *Dague,* 505 U. S. 557, 561–562 (1992) (explaining that "our case law construing what is a 'reasonable' fee applies uniformly" to fee-shifting statutes that use similar language, including, *inter alia*, 42 U. S. C. §1988 and 42 U. S. C. §2000e–5(k) (Civil Rights Act of 1964)).

this determination for Social-Security-benefit cases, prescribing a maximum contingent fee of 25%. And one can also say that a contingent-fee arrangement is, *ex ante*, unreasonable because the chances of success in the particular case are so high, and the anticipated legal work so negligible, that the percentage of the recovery assured to the lawyer is exorbitant; but neither I nor the Court thinks that the "reasonable fee" provision of the statute anticipates such a case-by-case *ex post* assessment of *ex ante* predictions in the thousands of (mostly small recovery) Social-Security-benefit cases. It is something quite different, however—and something quite irrational—to look at the *consequences* of a contingent-fee agreement *after the contingencies have been resolved*, and proclaim those consequences unreasonable because the attorney has received too much money for too little work. That is rather like declaring the purchase of the winning lottery ticket void because of the gross disparity between the $2 ticket price and the million-dollar payout.[2]

I think, in other words, that the "reasonable fee" provision must require *either* an assessment of the reasonableness of the contingent-fee agreement when it was con-

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[2]There is one *ex post* element prominent in Social-Security-benefit cases that assuredly should reduce the amount of an otherwise reasonable (that is to say, an *ex ante* reasonable) contingent-fee award: Since the award is based upon past-due benefits, and since the amount of those benefits increases with the duration of the litigation, a lawyer can increase his contingent-fee award by dragging his feet. It is unreasonable to be rewarded for dilatoriness. But *that* element need not be made part of an overall *ex post* reasonableness assessment, as the Court would do, see *ante*, at 18. For it is not only unreasonable; it is a breach of contract. Surely the representation agreement contains as an implicit term that the lawyer will bring the matter to a conclusion as quickly as practicable—or at least will not intentionally delay its conclusion. Any breach of that condition justifies a reduction of the contracted contingent-fee award.

cluded, *or* an assessment of the reasonableness of the fee charged after the outcome and work committed to it are known; it cannot combine the two. And since an *ex post* assessment of the *ex ante* reasonableness of the contingent-fee agreement (already limited by statute to a maximum 25% of the recovery) is not what the statute could conceivably have contemplated, I conclude that a "reasonable fee" means not the reasonableness of the agreed-upon contingent fee, but a reasonable recompense for the work actually done. We have held that this is best calculated by applying the lodestar, which focuses on the quality and amount of the legal work performed, and "provides an objective basis on which to . . . estimate . . . the value of a lawyer's services." *Hensley*, *supra*, at 433.

This is less of a departure than the Court suggests from the normal practice of enforcing privately negotiated fee agreements. The fee agreements in these Social-Security cases are hardly negotiated; they are akin to adherence contracts. It is uncontested that the specialized Social-Security bar charges uniform contingent fees (the statutory maximum of 25%), which are presumably presented to the typically unsophisticated client on a take-it-or-leave-it basis. Nor does the statute's explicit approval of contingency-fee agreements at the agency stage, see 42 U. S. C. §406(a) (1994 ed. and Supp. V), imply that contingency-fee agreements at the judicial-review stage should be regarded as presumptively reasonable. The agreements approved at the agency stage are limited not merely by a 25% maximum percentage of recovery, but also by a firm $5,300 maximum. With the latter limitation, there is no need to impose a reasonableness requirement. Once a reasonableness requirement is imposed, however, I think it can only refer to the reasonableness of the actual compensation.

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Because I think there is no middle course between, on the one hand, determining the reasonableness of a contingent-fee agreement and, on the other hand, determining the reasonableness of the actual fee; because I think the statute's reference to a "reasonable fee" must connote the latter; and because I think the Court's hybrid approach establishes no clear criteria and hence will generate needless satellite litigation; I respectfully dissent.