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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5

TITLE PENNSYLVANIA, ET AL., Petitioners V. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

PLACE Washington, D. C.

DATE October 15, 1986

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ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA, ET AL., :

Petitioners :

v. : No. 85-5

DELAWARE VALLEY CITIZENS' :

COUNCIL FOR CLEAN AIR, ET AL. :

- -x

Washington, D.C.

Wednesday, October 15, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

JAY C. WALDMAN, ESQ., Harrisburg, Pa.,
on behalf of Petitioners.

DONALD B. AYER, ESQ., Washington, D.C.;
on behalf of the United States, as amicus curiae,
in support of Petitioners.

JAMES D. CRAWFORD, ESQ., Philadelphia, Pa.;
on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: You may proceed whenever you're ready, Mr. Waldman.

ORAL ARGUMENT OF

JAY C. WALDMAN, ESQ.

ON BEHALF OF PETITIONERS

MR. WALDMAN: Mr. Chief Justice and may it please the Court:

In this case, the lower court applied a substantial contingency multiplier to an hourly rate it held to be high, for lawyers the Circuit Court of Appeals found to be inexperienced. This Court certified this case for reargument on the issue of whether a presumptively reasonable lodestar fee may ever be so enhanced for risk of loss and, if so, to what extent.

We submit that in the instant case to do so is clearly inappropriate, where the defendant at all material times bore the substantial burden of proof and where there was no specific finding that the lodestar fee was not adequate to fully compensate counsel as to all factors.

Further, we submit to you that the concept of contingency multiplication is fundamentially inappropriate for at least three reasons. We submit that it is inconsistent with the rationale of Blum, that

it compensates counsel for unsuccessful cases and claims, contrary to the intent of Congress as enshrined by this Court in Hensley and Ruckelshaus, and that it is not necessary, and indeed so unnecessary to effectuate the purpose of Congress in attracting competent counsel to federal rights cases that it can only invite marginal litigation and produce windfall fees, as in fact it did in the instant case.

The rationale for this practice as it has been applied since it has evolved over the past dozen years in most of our circuits is so irrationale that, frankly, it has been recast in this case since the last argument.

Courts were required after the fact to determine how unlikely it was they would reach the result they in fact reached. Defense counsel, in order to protect his client from substantial fees, was forced to argue that he really never had much of a case to start with. We were penalizing the best defenses.

It is so irrational that counsel has attempted to recast the risk of loss on reargument as the risk of non-payment and-or as the risk of losing a case not because of the strength or weakness of the merits, but because of the tenacity of the defense.

We submit to you that in a fee-shifting

context the risk of receiving no payment is the risk of losing the case. We submit to you that a meritorious case, if it is anything, is a case which counsel is likely to win, with adequate preparation and presentation and with due diligence and perseverance.

Indeed, the extent to which plaintiff's counsel is confronted with a tenacious defense and protracted litigation is ipso facto the extent to which his hours go up, and these are fully compensated within the lodestar calculation.

To enhance that fee further violates the fundamental rationale of the Blum case. We also submit to you that if it is inappropriate, as this Court held in Hensley, to provide any compensation whatsoever to an attorney for claims he lost in a case where he has partially prevailed, how can it possibly be reasonable to enlarge fees on claims on which he did prevail proportionate to how likely it was in retrospect that he would or could have lost them? This makes no sense.

Furthermore, I think that it's highly significant that the ABA, the amicus in this case, recognizes that at least as to lawyers who represent some winning cases -- or clients, excuse me, in some winning cases and in some losing cases, this practice clearly provides compensation for work performed on

unsuccessful claims.

They go on to arbitrarily characterize that class of lawyers as small, citing no evidence. I submit to Your Honors that all of the lawyers I know have won some cases and lost some cases, and I would submit to you that the class of lawyers who win some cases and lose some cases is in fact very large.

Also, the 12 small firms who came in as amicus acknowledged throughout their statement of interest that they depend on contingency multiplication to sustain them in terms of law firm economics, because there is work they take that they are not compensated for.

Indeed, even circuits which have permitted contingency multiplication up to now, like the Eighth, have recognized, in Ridenour versus Montgomery Ward, that providing contingency enhancement does in fact provide some compensation to lawyers for work they have done on unsuccessful claims.

Finally, we submit that all Congress intended when it adopted fee-shifting is to create an adequate inducement to attract competent counsel to important federal rights cases. It did not intend to perfectly replicate the private marketplace. It did not intend to replicate the highest possible fee a private lawyer might negotiate with a consenting client in a difficult

case.

It did not intend to recreate the highest possible fee the most sought-after lawyer in that marketplace might obtain. It intended to create an adequate, reasonable fee.

And I submit, Your Honors, that Congress has given us some indication of what it contemplates by a reasonable fee when less than four years ago they passed the Equal Access to Justice Act and provided that attorneys could get reasonable compensation under a threshold more difficult to meet, incidentally, than the one in the Clean Air Act case, and capped -- capped -- that compensation at $75 an hour.

And I submit to you that the fact that fee applicants for that $75 an hour increased 89.9 percent, almost doubled, from 1984 to 1985 strongly suggests that we have plenty of competent lawyers who are willing to take federal rights case and find a full lodestar fee more than enough to induce them to take a quality case or a meritorious case. And these are the cases this Court and the Congress have said they intended to be brought.

As Justice Powell noted in --

QUESTION: Mr. Waldman, may I ask you a question. I understand you're saying no enhancement by

way of lodestar multiplying the hourly rate. Do you think that, either under this statute or in the free market, that it's permissible for a lawyer who say his regular hourly rate when he's sure he's going to get paid is $100 an hour, if a client comes to him and he says, I'm not sure we're going to win this case or not, would it be reasonable for him to say that, if we lose I get nothing, but if we win I'm going to charge you $125 an hour, because I want to have some kind of hedge against the risk of nonpayment?

I'm not saying multiply the fee, but is there any factor of enhancement that's permissible as to the hourly rate in your view?

MR. WALDMAN: I would submit, Justice Stevens, that permissible or not, there is such a factor built into the market rate. When private lawyers at law firms set hourly fees, as any other business, I submit to you there's no question but that that fee reflects, at least in some part, the risk of nonpayment in some cases, late payment in other cases.

QUESTION: Well, does that mean in your view that a lawyer for two different clients performing the same services, in one case he could reasonably charge $125 an hour and in another $100 an hour, simply because in one case he's more sure of being paid than in the

cther?

MR. WALDMAN: I'm suggesting, Your Honor, that when a lawyer negotiates a fee with a private client he is free to not multiply, but enhance his normal hourly rate if that's what the client agrees to, for a whole variety of factors, including those this Court has absolutely rejected in Blum under the fee-shifting environment.

QUESTION: Well, but specifically for the risk of non-payment, would you say that was an appropriate thing to do, tc adjust to the market problem of not getting paid in the case?

MR. WALDMAN: It might be, Justice Stevens. And I submit to you that in the fee-shifting environment the whole concept of enhancement for risk of loss is inappropriate, where Congress designed --

QUESTION: Even if it duplicates what would happen in a free market?

MR. WALDMAN: The only reason, Your Honor, that we want tc duplicate, to the extent we might, what happens in the free market, is not because that in and of itself in the objective of Congress. We want to duplicate it only to the extent, I submit to you, that it's necessary to induce competent counsel to take federal rights cases.

And I submit to you that when we have almost 700,000 practicing lawyers, as Justice Powell noted in Santos-Rivera, and when there is absolutely no evidence that all of them are occupied 100 percent of the time with clients who promptly pay 100 cents on the dollar, in cases that are strong and winnable, there is no need to provide the maximum possible enhancement --

QUESTION: Well, no, I'm not suggesting that.

MR. WALDMAN: -- in order to get these attorneys --

QUESTION: But your argument is that we should not use a market test for this purpose, but rather a test of whether you really need any enhancement to get a lawyer to take the case.

MR. WALDMAN: Yes, I believe, Your Honor, we should effectuate the purpose of Congress, which was to provide an adequate incentive to attract competent counsel to federal rights cases. And I submit to you that the whole history, particularly of the $75 an hour fee experience, is that in order to do so we don't necessarily have to replicate the highest possible rate that a private lawyer might get from a consenting client in the private marketplace.

QUESTION: On the other hand, the rate might be higher than it would be for just the ordinary case,

mightn't it?

MR. WALDMAN: I'm sorry, Justice O'Connor?

QUESTION: The market might establish that a higher rate is appropriate in a given class of case than the ordinary rate that the lawyer would normally charge when sure of payment.

MR. WALDMAN: It might, Justice O'Connor. But of course, Congress hasn't limited lawyers in the private sector, for example, with these caps such as the $75 cap.

But I submit to you that private contingent practitioners can often take a case that results is lower compensation than the lodestar provides. You can agree to take a case for --

QUESTION: Yes, like you lose.

MR. WALDMAN: Well, or you could win, but you can spend two weeks in court to get a verdict of $40,000.

So I submit to you that the lodestar which provides compensation for every hour reasonably expended times in our case a high fee, at least one determined by the court to be high -- and I submit it was high for a lawyer one and a half years out of law school -- is more than adequate inducement.

QUESTION: Could I ask another question. I'm

not sure this is enhancement for risk of losing. I don't suppose it is. But under these fee-shifting statutes, as compared with the private market where you may get paid periodically, you are waiting. You are waiting to get paid until the suit is over and you've won it and then you have a proceeding. And it may be years.

Do you think it's permissible under the statute to say lodestar times hours plus some enhancement for having to wait so long?

MR. WALDMAN: It may be, Justice White. But I would --

QUESTION: Well, it may be, but how about yes or no.

MR. WALDMAN: Well, I'd like to make two very, very strong points. To the extent that the length of delay exceeds the portion of the normal hourly market rate that reflects the risk of delay, I would say yes.

QUESTION: Well, yes, but the normal market rate usually doesn't reflect the risk of delay, because an awful lot of fee arrangements you are paid as you go along.

MR. WALDMAN: I submit to you that the normal -- that the so-called, and it's a theoretical construct as this Court has developed, but to the extent to which

there is a normal prevailing hourly market rate in a market, I submit to you, Your Honor, that it does reflect some risk for nonpayment and some risk for delay of payment.

The fact is that lawyers when they --

QUESTION: But the fact is also that if you're working on an antitrust case it's going to take you ten years. A law firm, say with a paying client, will say, we'll bill you every month or every quarter, and you get paid as you go along.

MR. WALDMAN: Your Honor is absolutely correct. But I would submit to you, they also discount the fees, Your Honor. They discount the fees.

QUESTION: Yes, but that is not the case, that is not the case in these fee-shifting statutes. You don't get paid as you go along.

MR. WALDMAN: That is not totally correct.

QUESTION: And so you don't get a dollar until you win.

MR. WALDMAN: Well, as our case indicates, that's not totally correct. There was a significant payment made in this case in 1978.

But more to the point, when a lawyer quotes you his --

QUESTION: My question still goes. Is it

proper in any case to enhance for delay?

MR. WALDMAN: The answer is yes, but I must make two points. Clearly not in this case, where the issue was never raised or preserved, never asked for, and where no multiplier was used on the old phases, and where -- and secondly, where it's permissible, I would say that it is only permissible by awarding the then normal prevailing interest rate, an objective criterion, easily reviewable.

QUESTION: Mr. Waldman, could I ask you about another element that's --

MR. WALDMAN: I hope yes, Your Honor.

QUESTION: What about, does the lodestar include any element to take account of the fact that here we are only compensating winning lawyers? What I mean is, you may have an hourly rate in a market, but in fact a firm that wins a big case is likely either to bill more hours than it would in a losing case or perhaps to bill at a somewhat higher rate because of a big victory.

What you're compensating for under these schemes is only winning cases. Is it fair to use in the lodestar an hourly amount that is the hourly average of winning and losing cases?

MR. WALDMAN: I think, Justice Scalia, that

what really happens is the rate or the hourly fee you refer to, that gets quoted and used and billed, is in fact the highest rate a lawyer ever charges, and that when he gets a client with a good case who pays promptly, in fact he discounts that rate.

He doesn't multiply it. No one tells a client: My normal fee is $200 an hour --

QUESTION: But he eats a lot of time in losing cases, we all know that.

MR. WALDMAN: Yes, but Congress did not intend that losing defendants under fee-shifting statutes be made to make up that loss, particularly on a factor as tenuous as how good their defense was and how risky the case was for the plaintiff.

With the Court's permission, I would hope to reserve the remaining few minutes for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waldman.

We'll hear now from you.

ORAL ARGUMENT OF

DONALD B. AYER, ESQ.,

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

MR. AYER: Mr. Chief Justice and may it please the Court:

We think it's significant in the context of this case to note that compensation for bearing a risk of failure is something different than compensation for the performance of a legal service. The underwriting of litigation in most instances in this country is done by clients, and it's conceivable that it could be done by other people who are neither lawyers nor clients.

And we think that the question that this fact poses here is the question of whether lawyers are to be treated differently than clients with regard to the reimbursement for the bearing of this risk of failure.

The American Bar Association at page 20 of its brief indicates that when a client has a fixed fee there is then no occasion for compensation for the bearing of risk, the risk that the client bears in that situation. A number of appellate court cases agree with that proposition.

And we take that as the jumping off point for the argument that there ought to be a very good reason for awarding compensation to a lawyer for performing a function that a client or some other person who is not a lawyer would not be paid for performing.

We take that indication from what we know: number one, that the fee-shifting statutes are not intended to be relief acts for lawyers, thus suggesting

that a special privilege or a special form of compensation for them, not proper for someone else to receive, probably isn't proper. That is, it isn't proper to single out lawyers for that compensation.

We also know from the prevailing party limitation of the fee-shifting statutes that the whole idea of compensating for risk of failure, for the risk of not prevailing, is in essence nothing other than an effort to approximate compensation for not prevailing. That is, the whole idea of risk is how often will the failure occur and how do you compensate for it.

For reasons which have largely been stated by Mr. Waldman, we do not believe that the underlying purpose of the fee-shifting statutes, that is to provide effective access to the judicial system, requires this shifting of the burden, this risk of failure, in the case of lawyers.

And I'd like to mention a few points that he did not mention. I think the argument of the Respondents relies upon an economic hypothesis which turns out in reality not to be true. It's a hypothesis that lawyers are working full-time at some imagined fairly high market rate, and thus to pry them loose from that work it's necessary to compensate them at something higher than that market rate if they are going to be

working under a contingency situation.

The reality is, I think, that when we settle on a market rate the courts do the best they can to discern what that market rate ought to be, but in reality it is an estimate and it is not a figure that accurately reflects anything like what all competent lawyers are working at.

Indeed, attorneys who bill at say $100 an hour or $150 an hour do a substantial amount of work at rates that are less than that, and in some instances may not be fully employed at any rate. And it seems unrealistic to reach the conclusion that that particular rate, that market rate which is sort of arbitrarily settled upon, nevertheless must be paid in order to attract competent counsel to the cases that is Congress is concerned receive representation.

We think there is a factor that shouldn't be overplayed, but indeed I think it is a reality when you're looking at the question of whether adequate access to the court system does exist under a given form of fee-shifting.

And that is the fact that there are a substantial number of attorneys who do fee-shifting type work as a part of their practice, or indeed who do it in the form of a legal services practice, where the

monetary compensation, indeed, it's not irrelevant, but it's not a primary consideration. And thus it is reasonable to suppose that some decisions will be made not based upon, primarily at least not based upon, the economics of the law practice itself.

We also, apart from the issue of the economic compensation that's required in order to assure effective assistance of counsel in these cases, we also feel that this fee-shifting specially provided for for lawyers is not required under any reading of the legislative history of the fee-shifting statutes. And the legislative history that is most commonly cited, as indeed the only legislative history readily available, is the legislative history under Section 1988.

And the argument was made by Respondent in their brief and has been made elsewhere that those cases cited in the legislative history in 1988 in some sense adopt or accept a notion of fee-shifting. And I'd like to just address that for a second.

Number one, there are four cases cited in that legislative history and only one of them, the Zircher case, involves any contingency component, any enhancement for contingency of failure. Indeed, in that opinion the Court specifically reasons that that is necessary in order to compensate for unsuccessful cases,

and that of course is reasoning that has been rejected by this Court and it is clear, I think, clearly incorrect under the prevailing party limitation.

The fact that the other three cases do no invoke that form of reasoning, do not allow an enhancement for contingency, indicates, I think, quite the contrary to the argument that is being made. These are cases, when you read them -- one is the Swann case, the bussing case from the late sixties and the early seventies.

These are cases which indeed involve risk of failure, risk of not succeeding, and yet those courts do not adopt that kind of reasoning. Furthermore, this Court in its interpretation of that legislative history has made it very clear that it views that legislative history as Congress ratifying the general approach of those cases, not adopting every nuance and detail of the decisions which were made there.

Indeed, in the Hensley case this Court set limitations on the fees that can be recovered for the unsuccessful parts of litigation, which is -- I think limitations are inconsistent with the reasoning of these courts in Zircher and the Davis case.

And in the Blum case, this Court disallowed enhancements based on novelty and complexity and to some

degree on the qualify of representation, and I think the reasoning there is inconsistent with the lower court decisions in Zircher and Swann.

So I think it's fair to say that this Court has not viewed that legislative history as a list of commandments that Congress deliberately and carefully adopted. Indeed, it's very brief, the section that one can look at, and there is very little basis there to reach that kind of a conclusion.

If the Court has no questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

We'll hear now from you, Mr. Crawford.

ORAL ARGUMENT OF

JAMES D. CRAWFORD, ESQ.,

ON BEHALF OF RESPONDENTS

MR. CRAWFORD: Mr. Chief Justice and may it please the Court:

There are two questions which I would like to address briefly. This being the last case on the last day of the session, I'll try to be as brief as I can. The first question is why is a contingency enhancement appropriate, and the second is what are the flaws in Respondents' arguments against that enhancement.

I would take as my text a quotation from Judge Esterbrook in a grand case of Kirchoff versus Flynn, and I really cite it because it's a pleasure to read, 786 Fed. Second 320. He talks about a total fee; it includes the enhancement factor. He says:

"The computation of hourly fees depends on the number of hours reasonably expended, the hourly rate of each, the calculation of the time value of money to account for delay in payment, potential increases and decreases to account for risk and results obtained." He goes on to describe billing judgment, and I suggest that what you're talking about here is billing judgment.

You're also talking about whether people will take cases at the same fee when they're sure to be paid within a reasonable time and with some assurance as they take cases. And my authority for the fact that they would not is Rex Lee in his brief in Blum v. Stenson, in which he says:

"No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services regardless of success." The wisdom of the Government was great then. I suggest it remains great.

I also suggest that, on the delay factor, that

much more recently, just last term, Charles Rothfeld was arguing in Library of Congress versus Shaw, and he was asked about a delay factor. He said: "Well, that's imposing interest on the Government, and you can't."

Of course, and I can't remember, I think it was Justice Stevens' question, but someone questioned him about the propriety of an award for delay were it not against the Federal Government, and the answer was, why, of course that would be appropriate.

So I suggest that at least the Federal Government has well recognized that the factors that make up a contingency payment are appropriate. Secondly, I --

QUESTION: Mr. Crawford, why wouldn't -- if what you say is right, why wouldn't it have been a lot simpler for Congress to achieve that result by simply saying you get fees whether you win or lose?

MR. CRAWFORD: Justice Scalia, I don't think that was Congress' intent at all. I think Congress' intention was just one thing, to develop a fee structure which would reward winning counsel enough that they would take this kind of case. And the decision was to place the burden on the losing parties.

And plainly, I am going to suggest the argument goes on, you need no enhancement. The

wonderful Seventh Circuit horrible of horribles, if you take a case that's a one chance in 50 case, you're going to get a 50 times multiplier. That is not what we're talking about in any sense.

The decision is that only losing parties shall pay to winning parties, and that's totally appropriate. That's what Congress did. I think Congress did it because they wanted people to take good cases. But remember that good cases are often lost.

QUESTION: We really should take as our benchmark what we think is essential toward these kind of plaintiffs to get competent counsel?

MR. CRAWFORD: I think --

QUESTION: Rather than trying to replicate the private market?

MR. CRAWFORD: I think, Justice White, some piece --

QUESTION: I thought that's what you said.

MR. CRAWFORD: -- some piece of the private market plainly is what's involved. I think Solicitor General Lee's comments are based on a private market analysis. But you don't have to replicate it exactly.

The fact that perhaps if I were going to a wealthy client and he says, I'll tell you what, I'll either pay you an hourly rate or a contingency fee --

QUESTION: But in answer to Justice Scalia, you did say that Congress had provided for fee-shifting and only for prevailing parties because they wanted to make sure that people were able to get counsel.

MR. CRAWFORD: Fee-shifting was undoubtedly, Justice White, to get counsel, and I think that's what the legislative history says and the only sense of the statutes. My suggestion is that you are able --

QUESTION: Well then, you wouldn't say -- if it were perfectly clear around that there was no real problem about these kinds of plaintiffs getting lawyers, would you still say that enhancement is perfectly proper?

MR. CRAWFORD: I think enhancement's perfectly proper, but because it's clear that Congress considered among the factors, the Johnson factors, twelve of them, including the contingent quality of compensation.

QUESTION: But of course, we've already departed from the Johnson factors, haven't we?

MR. CRAWFORD: Because you found double counting, and no one I think reasonably suggests there is double counting on a contingency factor.

I suggest, to take it quickly, why else it is appropriate for contingency enhancement, the ABA picked up contingency as a factor for fees in 1908. It still

takes that as an appropriate factor in its brief in this case. In its history through the entire pericd in between, it has never departed from that view.

Congress considered in the legislative history contingency as one of the factors. The Courts of Appeals have universally before Blum and virtually universally after Blum said ccntingency is an appropriate factor.

The Seventh Circuit has waffled some, althcugh certainly when Judge Posner or Judge Esterbrook sit they come down strongly in favor of contingency. Most recently in the Lattimore case, with only cne active judge participating, they required extraordinary evidence or extraordinary situations for ccntingency. The D.C. Circuit has waffled.

Beyond those two circuits, it's pretty clear that the Courts of Appeals think that the legislative history is strong. They think it despite Blum.

I alsc suggest, just before I go on to answer an argument, that this is the right case. The suggestion is that somehow contingency should not be rewarded against someone who vigorously maintains a meritorious defense. The Commonwealth's briefs agree, the Government, the Solicitor General agrees, this case by their standards is one we couldn't have lcst, and the

vigorous defense was not because there was merit, but because there was an intention to stop the carrying out of a consent decree.

We weren't in quite as good shape as it looks, not because there was merit on the other side, but for instance, the supremacy clause, which Judge Becker said was our great defense, is no defense when the United States Government is on the side of the Commonwealth of Pennsylvania.

And the first delay, phase four, where the first multiplier came in, is a delay advised and requested by the Federal Government, and eventually only Delaware Valley persuaded Judge Bechtel that his consent decree meant what it said and required the emissions testing to go forward.

In phase five, the Federal Government thought, yes, it would be all right or at least participated without opposition to the final sanction which did produce the carrying out of the consent decree, that is the holding up of federal highway funds.

But then in phase seven, the last of the multiplier phases, the Federal Government showed its true colors again and said, yes, except that on all nine -- I'm sorry, on all eight projects unbuilt, there is some safety or air quality reason why the state should

be allowed to get its funds and go ahead.

Had Judge Bechtel bought that argument pushed on him by the Federal Government and by the Commonwealth of Pennsylvania, I assume there would still be no emissions testing in Pennsylvania, since it is clear that all that caused the legislature and the state to back down was the realization that they had lost highway funds.

And there, once again, Delaware Valley stood alone. So it wasn't so easy, but it wasn't because of a lack of merit in Delaware Valley's case. It was pure and simple because when you pick adversaries strong enough and they're willing to go hard enough, they may outlast you and they may beat you. They didn't here and a multiplier is an appropriate award in this case.

QUESTION: Well, Mr. Crawford, certainly in almost all cases that I can think of the fact that the other side fights harder, that you have a tough case and you spend more hours, will result in appropriate compensation by application of the lodestar to the greater number of hours.

MR. CRAWFORD: I don't question --

QUESTION: At the very least, shouldn't there be a strong presumption against application of any multiplier?

MR. CRAWFORD: I think, Justice O'Connor, that that is not appropriate on a contingency multiplier, because there were two things that happened from the kind of fight that took place here. One is that we ran more hours, and we've been compensated for those hours, and there's no multiplier for the fact that it took more hours.

The second is that when you face an adversary as unwilling to do what it has pledged that it will do in a consent decree as the Commonwealth of Pennsylvania is, there is the great danger that you'll never get the job done, and then you don't get paid for any hours.

QUESTION: Well, that's to suggest that it's really going to make a -- be a hard case to make a state live up to a court order, and that a judge is going to just sit and say: Well, if you want to disobey my order, you may.

MR. CRAWFORD: Justice White, Judge Bechtel for a good while was very understanding and did delay and extend and put off. And I think it was only very hard work that finally turned him around.

QUESTION: But in the long run, though, it sounds like it would be one of the easiest cases in the world to get -- to convince a judge that his order's being violated.

MR. CRAWFORD: Eventually we did it. But as you can see in the record, it wasn't easy. The Commonwealth thought we were wrong enough, they brought the case to this Court five times. I mean, the answer as to how the Commonwealth thought about it was that it shouldn't be easy. The practice wasn't easy.

Let me attack the arguments against contingency multipliers. First, the suggestion that they're double counting. Fees set at non-contingent rates don't count contingency. I mean, that's just clear on its face. In an appropriate case -- and certainly it was true here -- a district judge's duty under the decisions of this Court is to minimize the hours, and the judge stripped away any hours he thought might not have been appropriate.

Two members of the bar of this Court were paid $25 for the work they did. And the year and a half experienced lawyer who received that "high" $100 an hour in fact had had four years experience when he received it, and had been 29 years an engineer in the environmental field. To suggest that that person was being overcompensated at $100 an hour -- we couldn't get him at that rate.

In terms of compensation of losing parties, I think what you have to analogize a contingency

multiplier to is hazardous duty pay. One of the amicus briefs says, when you send an engineer into the jungle in danger of malaria and other diseases, you don't say when he comes back, give be back your hazardous duty pay; you don't say to people you send into combat, pay them $50 a month extra, is what I remember I could have gotten, but if you don't get shot give the extra back.

This is the inducement, not a doubling but an inducement, to get people to take dangerous cases. Again, the perverse result that the worse the case the higher the multiplier leads me back to Justice Holmes on McCulluch versus Maryland: The power to tax is the power to destroy, and Justice Holmes said: "Not while this Court sits."

And I suggest that not while this Court or the Courts of Appeals or indeed the district courts, as the evidence of the multipliers that have been allowed proves, are going to let --

QUESTION: Why is that? What is the rational test that we use if it is not that the one that produces the 50 to one situation?

MR. CRAWFORD: Justice Scalia, I suppose that the rule is what is colled in Judge Esterbrook's language billing judgment, a common sense realization that cases that are such long shots that they need a 50

to one multiplier to get people to take them probably shouldn't be taken, although I would hate to think that the beginning of the war against segregated schools wouldn't have been taken because of that kind of danger, or the next, equally important rule. But --

QUESTION: I can assure you --

MR. CRAWFORD: You had no multiplier.

QUESTION: -- fees like that weren't there.

MR. CRAWFORD: I am sure of it, Justice Marshall.

QUESTION: The test is common sense.

MR. CRAWFORD: The test is common sense and probably a limitation somewhere in the two or three multipliers.

QUESTION: Why, why?

MR. CRAWFORD: That's I suppose because, like most things the common law does -- and building a federal common law on that statute has happened here -- the experience of innumerable district courts who have never given a multiplier of more than four and probably, given Blum, wouldn't give a multiplier that high, tells you where the range of multipliers is appropriate.

QUESTION: Based on -- whether it should be two, three, or four is based on how uncertain the victory was?

MR. CRAWFORD: I would suppose it's based on the discretion of the district judge, and the factors he should probably take into account are something to do with how important the case is to be brought. And I think of that, whether it's another case enforcing a known law with no new questions and simply the equivalent to a tort case, it just says say it again, Sam, as against the case that opens new ground, that really does develop what Congress had in mind with their statutes.

QUESTION: So it doesn't matter how -- even if it's a certain case that opens new ground, you'd get a lot of --

MR. CRAWFORD: No, Justice Scalia, I don't think this Court would permit it. I don't think my Court of Appeals would, and I doubt that many would.

QUESTION: Well, I would hate to have to figure it out on the basis of nothing more than common sense. Litigating about this kind of matter seems to me especially wasteful, and it seems to me that what we're looking for is a test that is easily applied by the district courts, the Court of Appeals, and if necessary this Court.

MR. CRAWFORD: Well, you could, I suppose, take Professor Leubsdorf's test. He is the scholar

cited so often by the Commonwealth the first time around. He would suggest that a doubling multiplier is applicable in those cases where there is a contingency involved.

He would say, you take a sure-shot case and you don't have a multiplier at all; once you have a case that's a contingent case you double and that becomes your fee.

I think you leave more dicretion to the district court, because the district court can look at the whole history of this Court's cases.

Let me touch my last point, and that's that nothing in Blum versus Stenson forbids a contingency multiplier. The Court said specifically in footnote 17: "We don't reach the question of a contingency multiplier." The concurring opinion said: "We think the Court was very wise not to reach the contingency multiplier; it's appropriate, and when we're cutting away a batch of multipliers which do tend to be double counting or unnecessary, there's no reason to reach that one."

The factors dealt with in Blum as multiplier factors are those that are normally affected in hours -- novel questions, complex issues require more hours -- or in rates -- the person with special skills. Maybe in

most cases even the quality of representation, you set the rates to reflect that.

The question of contingency is not set in the rates and it shouldn't be set in the hours. You take a tough case and you don't win it by throwing hours at it. The court here very plainly picked a rate which didn't have any contingency multiplier built in.

And finally, I suppose the reason that Blum doesn't have anything to do with the case here is that the contingency multiplier is to get people into the cases, just what Congress talked about when it passed the statute. When you take a case you say, I'm likely not to get paid anything, as the former Solicitor General said, so I've got to have something better than what I could get by going out and taking insurance defense cases to make me take the case.

By contrast, when you decide to take the case you certainly don't say, well, I wonder if I'm going to get an enhancement for high quality of performance, I wonder if I'm going to get an enhancement for the difficulty of the questions. You know that's coming in hours or rates.

So there is simply no application to the concern -- the Blum concerns have no application to the contingency multiplier. I suggest --

QUESTION: You think lawyers in your position, when they approach you to represent them, may say yes or no depending upon whether you could anticipate an enhancement if you win?

MR. CRAWFORD: It is obvious, Justice White, that large law firms in this country -- and I come from one of the large ones, or the Cravath office which wrote the amicus brief for the American Bar Association, are happy to provide pro bono time, and they don't need a contingency multiplier.

QUESTION: Pro bono time at lodestar rates.

MR. CRAWFORD: Or pro bono time at lodestar rates. But the fact is, if you write amicus briefs you don't even expect a lodestar rate.

QUESTION: I understand that.

MR. CRAWFORD: There is plenty of charitable work done by our profession. It's one of its prides. It is not necessary for the person who believes he needs to or she needs to advance --

QUESTION: Well, tell me the lawyers who are going to go through that calculation: no enhancement for contingency, therefore I don't take the case.

MR. CRAWFORD: I assume that these statutes where Congress passed fee-shifting --

QUESTION: Well, just how about my question.

MR. CRAWFORD: I will answer your question, Justice White. I assume these statutes are to protect ordinary people with no access to big firms. They go to the local lawyer, they go to the local firm which has shown some interest in doing pro bono -- doing public interest, not pro bono work. And they say, will you take my case.

And that firm, like the 12 small firms that filed an amicus brief here, is likely to say: There is a limit to how much of this business we can take because we can't afford to take it. We pay secretaries real money --

QUESTION: Well, as I understood this, I understood that brief, a major part of the complaint is the delay.

MR. CRAWFORD: Delay, Justice White, is plainly a factor.

QUESTION: Yes, well, a major factor.

MR. CRAWFORD: If you could bill as you went, but you don't know you're going to win yet so you can't. So delay is plainly one of two factors that builds the contingency multiplier, a vital one.

And I suggest that for the people that are representing some of the people in these cases --

QUESTION: So you think these 12 firms that

wrote the amicus brief just would say: Sorry, we just can't take your case?

MR. CRAWFORD: I would suppose, Justice White, they would say we can't take as many cases. They would say, we're going to have to do more other kinds of work to support you.

QUESTION: Well, they're going to say, we're going to take cases, we're going to confine our efforts to cases that we think we've got a pretty good chance of winning.

MR. CRAWFORD: Perhaps even that we're virtually sure of winning. And a great many cases that prove meritorious in the end would not be brought. And Congress, I maintain, wanted those cases brought. That's why they passed the fee-shifting statute.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Crawford.

Mr. Waldman, do you have anything more? You have three minutes remaining.

REBUTTAL ARGUMENT OF

JAY C. WALDMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. WALDMAN: Yes, just to rebut a few points.

First, in defense of Rex Lee, I think I should point out that the Solicitor General quoted from a case, Turner v. Transistor Electronics, and he is re-quoted in that sense accurately, but he never adopted or accepted the language that is quoted in the brief of the Solicitor General.

Even circuits which have awarded contingency multiplication have recognized that the market rate contains already something for contingency: Copeland, Ridenour, for example.

QUESTION: Are you telling us Mr. Lee was quoting material that was against his position?

MR. WALDMAN: No, I am saying that he did not adopt that. It happens to be a quote from a cite he cites in the brief.

QUESTION: It's kind of an interesting comment.

MR. WALDMAN: Which he shot down.

Stanford Daily is the case that started this whole concept of contingency multiplication, and it's critical to note that the Court in that case expressly said contingency and the quality of representation and all the other Blum factors are often interrelated, are often interrelated.

Finally, Mr. Crawford concedes that Congress

wanted to provide an award that was just enough to induce competent counsel to take a meritorious case. I submit to you that the whole contingency multiplication practice can only invite risk-takers.

The lodestar is more than sufficient to compensate a lawyer who takes a meritorious case, one that's likely to be won with adequate work and preparation. All this risk enhancement can do is create a class of risk-taking attorneys who recognize that by winning only one out of four or five cases they could be compensated for all their time, time that might otherwise be spent totally unproductively, on no other client.

When you have a client that pays 100 cents on the dollar, I submit to you you generally take your normal hourly rate and discount it.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waldman.

The case is submitted.

(Whereupon, at 2:47 p.m., oral argument in the above-entitled matter was submitted.)

CERTIFICATION

derson Reporting Company, Inc., hereby certifies that the tached pages represents an accurate transcription of lectronic sound recording of the oral argument before the preme Court of The United States in the Matter of:

#85-5 - PENNSYLVANIA, ET AL., Petitioners V.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

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BY Paul A. Richardson

(REPORTER)