Essay

Reasonably Untimely: The Difficulty of Knowing When to File a Claim for Attorney's Fees in Social Security Disability Cases, and an Administrative Solution

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Introduction

In 2008, over 13,000 claims under the Social Security laws were filed in the district courts of the United States.[1] Victorious claims, however, require not only bona fide claimants, but also persistent lawyers. Attorneys who successfully represent Social Security disability claimants and win past-due benefits for them are entitled to reasonable fees payable out of those benefits.[2] Unfortunately, the statute granting attorney's fees does not specify when a petition for such fees must be filed. Moreover, the default timeframe of the Federal Rules of Civil Procedure is wholly inadequate to govern fairly the lengthy and complex process of vindicating Social Security disability claims.

Part I of this Essay reviews the statutory and caselaw history underpinning applications for attorney's fees. Part II examines the two main suggestions from courts of appeals for dealing with this problem

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1 Statistics Div., Office of Judges Programs, Admin. Office of U.S. Courts, Judicial Facts and Figures tbl.4.4 (2008).

2 *See infra* notes 5–9 and accompanying text.

and finds them lacking. Part III proposes and evaluates some possible solutions. It suggests that the establishment of local rules may be the best *judicial* method of dealing with this problem, but notes that drawbacks to such a solution still exist. As a superior alternative, this Essay suggests that a rule promulgated by the Social Security Administration ("SSA") would achieve clarity and consistency, and effectively alter the behavior of attorneys and courts to achieve a nationwide remedy. Specifically, SSA should state that, as a policy, it will oppose any motion for attorney's fees not filed within a certain time period after it has issued its notice of award.

I. Background: Statutes and Caselaw

Congress passed the Social Security Amendments of 1956, which, for the first time, established federal disability benefits.[3] Within a decade, Congress further amended the Social Security Act,[4] statutorily authorizing the award of attorney's fees for the successful representation of a claimant in court proceedings;[5] two years later, a similar provision was enacted for attorney's fees incurred before administrative proceedings of the SSA.[6] Under 42 U.S.C. § 406(b), "[w]henever a court renders a judgment favorable to a claimant . . . who was represented before the court by an attorney, the court may determine and allow . . . a reasonable fee for such representation"; that fee, however, may in no event exceed twenty-five percent of the claimant's award.[7] Once the reasonable fee is determined by the court, it is paid by SSA out of the claimant's past-due benefits directly to the attorney.[8] While the reasonableness determination is pending, SSA will withhold the entire amount of the attorney's fee that has been contractually agreed to, up to twenty-five percent.[9] The specifics of § 406(a) govern pay-

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3 *See* Social Security Amendments of 1956, Pub. L. No. 84-880, § 103, 70 Stat. 807, 815–24 (codified as amended at 42 U.S.C. § 423 (2006)). Although removed in 1960, a limitation on disability benefits originally made them available only to individuals fifty or above. *See* Social Security Amendments of 1960, Pub. L. No. 86-778, § 401(a), 74 Stat. 924, 967 (codified at 42 U.S.C. § 423).

4 Social Security Act, 42 U.S.C. §§ 301–1397jj (2006).

5 Social Security Amendments of 1965, Pub. L. No. 89-97, § 332, 79 Stat. 286, 403 (codified at 42 U.S.C. § 406(b)(1)). Prior to congressional action, two courts of appeals held that the Social Security Act impliedly authorized such payments. *See* Celebrezze v. Sparks, 342 F.2d 286, 288–89 (5th Cir. 1965); Folsom v. McDonald, 237 F.2d 380, 382–83 (4th Cir. 1956).

6 Social Security Amendments of 1967, Pub. L. No. 90-248, § 173, 81 Stat. 821, 877 (codified at 42 U.S.C. §§ 405–406).

7 42 U.S.C. § 406(b)(1)(A).

8 *Id.*

9 *See* 20 C.F.R. § 404.1730(b)–(c) (2009); *see also* Smith v. Bowen, 815 F.2d 1152, 1155

ment of fees for the work that a successful attorney performs before SSA. Like § 406(b), subsection (a) makes the fees contingent upon reasonableness,[10] but also limits any fees to the lesser of one quarter of past-due benefits awarded or $4000.[11] In enacting § 406(b)(1), Congress sought to achieve two related goals. First, the provision seeks to protect Social Security claimants from exorbitant attorney's fees.[12] Second, the provision encourages attorneys to represent Social Security claimants by authorizing SSA to pay attorney's fees out of the claimant's benefits and directly to the attorney.[13]

These two provisions of § 406 are the *only* means by which attorneys who obtain past-due benefits for claimants can obtain fees.[14] Yet, attorneys for claimants of Social Security benefits can also obtain payment of fees directly from the government, under the Equal Access to Justice Act ("EAJA"),[15] if, inter alia, the government's position during litigation was not "substantially justified."[16] An EAJA award is not based on the amount of the Social Security award recovered, but on the expenses and reasonable hourly rates expended in trying the case.[17] Attorneys may obtain fees under both the EAJA and 42 U.S.C. § 406(b), but they must return the smaller of the two fees to their clients.[18] By the terms of the statute, attorneys are required to submit an application for fees under the EAJA to the court within thirty days of the court's entry of judgment.[19]

The matter becomes more complicated when a denial of Social Security benefits is appealed to a district court. Depending on the outcome of the appeal, there are two distinct and exclusive ways that Social Security cases may be remanded by the district court to SSA. In *Shalala v. Schaefer*,[20] the Supreme Court distinguished between remands in cases made pursuant to sentence four of 42 U.S.C. § 405(g)

(7th Cir. 1987) (noting that the regulation has regularly been applied not only to services before SSA but also to fees for services before courts).

10 42 U.S.C. § 406(a)(1).

11 *Id.* § 406(a)(2)(A).

12 *See* Gisbrecht v. Barnhart, 535 U.S. 789, 804–05 (2002); McGraw v. Barnhart, 450 F.3d 493, 499–500 (10th Cir. 2006).

13 *See Gisbrecht*, 535 U.S. at 804–05, 804 n.13.

14 *Id.* at 795–96.

15 Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980) (codified as amended at 28 U.S.C. § 2412 (2006) and 5 U.S.C. § 504 (2006)).

16 28 U.S.C. § 2412(d)(1)(A) (2006).

17 *Id.* § 2412(d)(1)(B), (2)(A).

18 *See Gisbrecht*, 535 U.S. at 796.

19 28 U.S.C. § 2412(d)(1)(B).

20 Shalala v. Schaefer, 509 U.S. 292 (1993).

and those made pursuant to sentence six of that same subsection.[21] Remands pursuant to sentence four are final judgments, whereas courts retain jurisdiction when remanding pursuant to sentence six.[22] The Court established that claimants who obtain remands pursuant to sentence four have final judgments and therefore can be considered prevailing parties for the purposes of their attorneys' EAJA fee petitions.[23] Though discussing the Social Security claims in the EAJA context, the Court has also made clear that the "judgment" that starts the period in which an attorney must file for fees "refers to judgments entered *by a court of law*, and does not encompass decisions rendered by an administrative agency."[24]

The procedures sound relatively straightforward, but a problem arises in the timing of motions for attorney's fees. Section 406 does not specify a time limit for fee applications. In the absence of a statute or court order, Federal Rule of Civil Procedure 54(d) requires an attorney to apply for fees within fourteen days of the entry of judgment.[25] However, it is rare, if ever, that SSA will calculate awards of

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21 *See id.* at 296–97. The fourth sentence of 42 U.S.C. § 405(g) states that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing," whereas sentence six explains:

> The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security . . . and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

42 U.S.C. § 405(g) (2006).

22 *Schaefer*, 509 U.S. at 297. Of course, it is possible for a district court to issue a sentence-six remand and then, upon review of further agency actions or records, issue a sentence-four remand. *See, e.g.*, McGraw v. Barnhart, 450 F.3d 493, 496 (10th Cir. 2006) (describing such a procedural history of the claimant's case).

23 *Schaefer*, 509 U.S. at 300–02; *see also id.* at 300 ("[A] sentence-four remand . . . terminates with victory for the plaintiff, and a sentence-six remand . . . does not.").

24 Melkonyan v. Sullivan, 501 U.S. 89, 96 (1991).

25 FED. R. CIV. P. 54(d)(2)(B)(i). In whole, subpart (B) states:

> *Unless a statute or a court order provides otherwise*, the motion must:
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> (i) be filed no later than 14 days after the entry of judgment;
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> (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
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> (iii) state the amount sought or provide a fair estimate of it; and

attorney's fees within fourteen days of a district court's sentence-four remand order.[26] As such, what is an attorney to do? Or more accurately, *when* is an attorney to do it? Only a few circuit courts have addressed the issue,[27] and various district courts around the country have adopted their own solutions.

II. Varying Approaches

A. The Eleventh Circuit: The Ever-Changing Approach

In *Bergen v. Commissioner of Social Security*,[28] the United States Court of Appeals for the Eleventh Circuit determined that in the absence of a specified timeframe within the statute itself, motions for attorney's fees pursuant to § 406(b) shall be governed by Rule 54(d)(2), which, as discussed above, requires petitions to be made within fourteen days of a judgment.[29] In *Bergen*, the district court reversed SSA's decision denying the plaintiffs' disability claims and remanded the case to SSA for further proceedings.[30] Ultimately, SSA awarded both plaintiffs past-due benefits, but the district court denied the petitions for attorney's fees, finding that § 406(b) did not authorize the award of fees in these cases.[31] The court went on to note that even if § 406(b) did authorize such an award, the petitions were not timely filed, because the Federal Rules of Civil Procedure and local rules required that the petition be made within fourteen days of the entry of judgment.[32]

> (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

FED. R. CIV. P. 54(d)(2)(B) (emphases added).

26 *See McGraw*, 450 F.3d at 504; *see also* Smith v. Bowen, 815 F.2d 1152, 1156 (7th Cir. 1987) ("[A]n attorney petitioning for fees under § 406 will not usually know until after ninety days the amount of fees he will be requesting as a portion of the past-due benefits.").

27 *See infra* Part II.A–B (discussing the caselaw from the Tenth and Eleventh Circuits). The Seventh Circuit held that applications for attorney's fees in this context were governed by Rule 54, which at the time had no time limit other than "reasonableness." *See Smith*, 815 F.2d at 1156. It is unclear, given the fourteen-day time limit that is now part of Rule 54, whether *Smith* is still good law.

28 *See* Bergen v. Comm'r of Soc. Sec. (*Bergen II*), 454 F.3d 1273 (11th Cir.) (per curiam), *vacating and superseding* 444 F.3d 1281 (11th Cir. 2006).

29 *Id.* at 1277.

30 *Id.* at 1274–75.

31 *Id.* at 1275. According to the district court, because it ordered only further consideration by SSA on remand, which could have resulted in an award of benefits *or* another denial, the remand order did not entitle the claimants to benefits within the meaning of § 406(b) and therefore did not authorize the award of attorney's fees. *Id.* at 1275–76.

32 *Id.* at 1275.

On appeal, the Eleventh Circuit reversed the district court.[33] As a preliminary matter, the appeals court held that when a district court remands a case and SSA subsequently awards past-due benefits, that remand order is a "judgment favorable to a claimant"[34] authorizing attorney's fees under the statute.[35] The court was less certain about *when* a petition for attorney's fees must be made. This unease is clear because the court withdrew its first opinion less than four months after issuing it, and replaced it with one that was almost identical.

The only difference in the opinions related to the timing issue. Originally, the Eleventh Circuit found that applying Rule 54(b) to the instant petitions for attorney's fees was "impractical in light of the exigencies particular to post-judgment proceedings in Social Security cases."[36] Because determining whether and when SSA will award a claimant past-due benefits at the time of the district court's remand is usually not possible, the circuit court held that Rule 54(b)'s fourteen-day limitation period "should begin to run from the day that the award notice is issued."[37] Accordingly, the court held that the motion of one claimant's attorney for fees—filed ten days after SSA's award notice—was timely, but the motion of the other claimant's attorney—filed twenty-nine days after SSA's award notice—was not.[38] The impracticality was alleviated, but not yet cured.

Ninety-three days later, the appeals court withdrew its decision and replaced it with another.[39] In its superseding opinion, the court decided again that Rule 54(d) does apply to claims for attorney's fees under § 406(b).[40] But the court expressly declined to address when the fourteen-day period for filing began to run because SSA had not challenged the timeliness of the claims.[41] Rather, in a footnote, the court suggested that the practice of moving the district court for an extension of the filing period at the time of the remand order would have avoided the confusion over timing.[42]

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33 *Id.* at 1278.

34 42 U.S.C. § 406(b)(1)(A) (2006).

35 *Bergen II*, 454 F.3d at 1277.

36 Bergen v. Comm'r of Soc. Sec. (*Bergen I*), 444 F.3d 1281, 1285–86 (11th Cir.) (per curiam), *vacated and superseded*, 454 F.3d 1273 (11th Cir. 2006).

37 *Id.* at 1286. Unfortunately, neither of the court's opinions states the length of time between the district court's remand order and SSA's award of benefits.

38 *Id.*

39 *Bergen II*, 454 F.3d at 1274.

40 *Id.* at 1277.

41 *Id.* at 1277–78.

42 *Id.* at 1278 n.2.

The upshot of this revised opinion was that *both* attorneys' motions were considered timely.[43] Though the court of appeals has yet to revisit the issue with more definitive treatment, courts within the Eleventh Circuit have extracted two different approaches from the latter *Bergen* decision. In one approach, courts will grant a motion for attorney's fees under § 406(b)—regardless of when it was filed—when it goes unopposed by SSA.[44] In another approach, courts will, at the time they issue remand orders, specify a time period after an entry of award of benefits by SSA within which attorneys must apply for fees. The problem with this latter approach, however, is that courts have varied widely over what they consider to be a reasonable time within which a fee petition is due. In the Northern District of Georgia, for example, attorneys have ninety days in which to file a motion for fees;[45] in the Middle District of Alabama, sixty days;[46] and in the Middle District of Florida, attorneys have only fourteen days to file.[47] At least one court, rather than establishing a timeline, has stayed proceedings for attorney's fees until after SSA fully adjudicates the matter on remand.[48]

Yet, this suggestion from the latter *Bergen* decision has not solved the problem. As recently as 2008, the Eleventh Circuit vacated and remanded a denial of attorney's fees as an abuse of discretion.[49] The court said that "the unique circumstances" created by a sentence-four remand justified vacating the holding.[50] No specific facts were recounted in the court's opinion, but the court did note that normally SSA did not compute the claimant's award (or, consequently, the attorney's fees) until months after the district court's remand.[51] "Unique," then, did not refer to the particular situation of the claim-

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43 *Id.* at 1278.

44 *See, e.g.*, McKee v. Comm'r of Soc. Sec., No. 6:07-cv-1554-Orl-28KRS, 2008 WL 4456453, at *2 (M.D. Fla. Sept. 30, 2008); Ugorek v. Astrue, No. 3:04-cv-1119-J-TEM, 2008 WL 169737, at *1–2 (M.D. Fla. Jan. 17, 2008).

45 *See, e.g.*, Newton v. Astrue, No. 1:06-CV-1542-AJB, 2008 WL 915923, at *16 (N.D. Ga. Apr. 1, 2008).

46 *See, e.g.*, Curry v. Astrue, No. 1:08cv382-WC, 2009 WL 88502, at *1–2 (M.D. Ala. Jan. 13, 2009). This practice, as well as the sixty-day time limit, have been adopted by one court in another circuit where the court of appeals has not yet addressed the timing issue. *See* Scharlatt v. Astrue, No. C 04-4724 PJH, 2008 WL 5000531, at *5–6 (N.D. Cal. Nov. 21, 2008).

47 *See, e.g.*, Ramer v. Astrue, No. 3:08-cv-484-J-TEM, 2009 WL 2905904, at *10 (M.D. Fla. Sept. 8, 2009).

48 *See* Stacy v. Astrue, No. 1:08-cv-00231-MP-AK, 2009 WL 2255677, at *1 (N.D. Fla. July 24, 2009).

49 Blitch v. Astrue, 261 F. App'x 241, 242 (11th Cir. 2008) (per curiam).

50 *Id.* at 242 n.1.

51 *Id.*

ant's attorney. Instead, the court addressed the situation of all attorneys seeking SSA fees after a sentence-four remand, as compared to those seeking fees after a sentence-six remand. The court of appeals then noted that "the best practice [of specifying a timeframe in the district court's remand order] has not been a universally-workable solution."[52]

As an alternative, the court suggested that creating a district-wide local rule would be a better approach.[53] Despite the potential to solve the problem, courts have not appeared to embrace this procedure either. Besides the district court from which this particular case was appealed,[54] no other district in the Eleventh Circuit has adopted this approach. Indeed, a survey of district court rules nationwide reveals that only a few courts have adopted rules to deal with the particular timing quandary inherent in procuring attorney's fees in Social Security cases.[55]

There exist several problems with the Eleventh Circuit's approach. First, and most blatantly, interpreting Rule 54 to allow a reasonable time violates the clear and plain language of the rule, which states that fee petitions must be filed within fourteen days of the entry of judgment.[56] Second, the court of appeals and lower courts have apparently treated SSA's award decision as the "judgment" from which the timing begins to run. This approach, however, seems inconsistent with the caselaw. The Social Security Act authorizes attorney's fees for a lawyer who procures "a judgment favorable to a claimant"—namely, past-due benefits—when those benefits are awarded "by reason of such judgment."[57] SSA had at one time argued that benefits awarded to a claimant by SSA, after a district court had remanded for further consideration, did not satisfy this requirement because the benefits were awarded by reason of an SSA determination, not the court's judgment remanding the case.[58] Nevertheless, the courts of appeals that have addressed this argument have unanimously

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52 *Id.*

53 *Id.*

54 *See* Procedures For Applying For Attorney's Fees Under 42 U.S.C. §§ 406(b) and 1383(d)(2), N.D. Ga. Standing Order No. 08-03 (2008), *available at* http://www.gand.uscourts.gov/pdf/Standing_Order_08-03.pdf (requiring filing of motion for attorney's fees under § 406(b) within thirty days from the date of the agency's award-calculation letter).

55 *See infra* note 97.

56 As mentioned *supra* text accompanying notes 28–29, Rule 54 was specifically amended to replace the vague timeframe of reasonableness with a fourteen-day period.

57 42 U.S.C. § 406(b)(1)(A) (2006).

58 *See, e.g.*, Conner v. Gardner, 381 F.2d 497, 499 (4th Cir. 1967).

held that a district court's remand order that eventually results in an award of benefits *does* satisfy the criteria for the award of attorney's fees.[59] If the district court's remand order is the judgment that gives attorneys the right to get fees, how can it not be the judgment from which Rule 54(d)(2)(B)(i)'s timing requirement begins to run? If courts have noticed this inconsistency, they have not mentioned it.

Furthermore, not only the claimant, but also his dependents, may receive Social Security benefits when the claimant is deemed disabled.[60] The Supreme Court held long ago that an attorney may be awarded fees based on the claimant's awarded benefits *and* any benefits awarded to the claimant's dependents.[61] These additional benefits may be issued by SSA in multiple awards rather than all at once.[62] In such a situation, does the timing period begin to run when the first award notice arrives, or does it not start until the last one? These foregoing considerations suggest the weakness of the Eleventh Circuit's approach.

B. The Tenth Circuit: Drinking from the Reservoir of Justice

The United States Court of Appeals for the Tenth Circuit, rejecting the Eleventh Circuit's approach in the first *Bergen* decision, announced in *McGraw v. Barnhart*[63] that a motion for an award of attorney's fees under § 406(b) should be made pursuant to Federal

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59 *See Bergen II*, 454 F.3d 1273, 1276–77 (11th Cir. 2006) (listing cases); McGraw v. Barnhart, 450 F.3d 493, 501–03 (10th Cir. 2006) (discussing cases); *cf.* Shalala v. Schaefer, 509 U.S. 292, 300–02 (1993) (determining that a district court remand under sentence four was a favorable judgment in the EAJA context).

60 *See* 42 U.S.C. § 402(d) (providing that children who file an application and qualify as dependents "shall be entitled to a child's insurance benefit").

61 Hopkins v. Cohen, 390 U.S. 530, 534–35 (1968).

62 *See, e.g.*, Bentley v. Comm'r of Soc. Sec., 524 F. Supp. 2d 921 (W.D. Mich. 2007). SSA did not make its final determination in Bentley's favor until almost ten months after the district court's remand. *Id.* at 922. The agency issued several separate award notices for the claimant and his dependent children over the course of seven months, beginning in March 2007. *Id.* The court found that the attorney showed "reasonable diligence" by filing his petition for fees two months after he received the first award notice without waiting for the receipt of all the subsequent notices. *Id.* at 924.

63 McGraw v. Barnhart, 450 F.3d 493 (10th Cir. 2006).

Rule of Civil Procedure 60(b)(6)[64] and "within a reasonable time" of SSA's decision awarding benefits.[65]

The facts in *McGraw* are substantially similar to, though slightly more complex than, those in *Bergen*. McGraw's claim for disability benefits was initially denied by SSA; he appealed, and the district court remanded the case to SSA for further consideration—though without ruling on the correctness of SSA's denial—pursuant to sentence six of § 405(g).[66] Based upon a status report filed four months later, the district court again remanded the claim to SSA, this time under sentence four, and entered a judgment in McGraw's favor.[67] SSA notified McGraw of his past-due benefits on December 16, 2002, but his counsel did not move for attorney's fees until February 19, 2004.[68] The district court denied the motion, ruling—as did the district court in *Bergen*—that attorney's fees are not authorized under § 406(b) when SSA, rather than the court, determines whether and how much past benefits are due.[69]

The court of appeals reversed the district court and held that § 406(b)(1) authorizes the award of attorney's fees even when a district court's judgment is only for further SSA proceedings.[70] Anticipating the timing difficulties that the district court did not address below, but would face on remand, the Tenth Circuit decided to specify the proper procedures for claims for attorney's fees.[71] Though recognizing that Rule 60(b)(6) is "reserved for exceptional circumstances," the court decided that, "as a grand reservoir of equitable power to do justice in a particular case," the best option for attorneys would be to use this rule to seek attorney's fees under § 406(b)(1).[72] Henceforth, in the Tenth Circuit, attorneys must file for fees within a reasonable time of an SSA decision awarding benefits, and the decision whether

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64 The rule provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect . . . ; or
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> (6) *any other reason justifying relief from the operation of the judgment.*

FED. R. CIV. P. 60(b) (emphasis added).

65 *McGraw*, 450 F.3d at 505. *McGraw* was decided on June 13, 2006, after the Eleventh Circuit published its first *Bergen* decision, but before it was withdrawn and replaced. *Id.* at 493.

66 *Id.* at 496.

67 *Id.*

68 *Id.* at 496–97.

69 *Id.* at 497 (citation omitted).

70 *Id.* at 503.

71 *Id.* at 503–04.

72 *Id.* at 505 (internal quotation marks and citations omitted).

to grant those motions under Rule 60(b)(6) resides in the sound discretion of the district courts.[73]

In a later case, for example, the appeals court held that the lower court did not abuse its discretion when it denied a petition for attorney's fees filed thirteen months after notice of award and fifteen months after SSA's favorable determination on remand.[74] Nevertheless, it is difficult to predict whether a district court will decide that a petition for fees has been filed in a reasonable time. For instance, one district court in the Tenth Circuit held that a petition filed almost three years after notice of award was not filed in a reasonable time when there was no explanation for the delay and SSA "raised the timeliness issue."[75] Yet on the same day, the same judge granted a motion for fees as timely filed.[76] The court was far less explicit about the timeframe and omitted any mention of the dates, but did note—rather irrelevantly, given *McGraw*—that the attorney could not have filed the petition within fourteen days of the district court's remand order, and that SSA had mentioned timeliness but did not oppose the fee motion.[77] Given the court's less-than-complete recital of the facts and law in the second case, it is hard not to conclude that the court arbitrarily granted one motion and denied the other.

In a case from Oklahoma, a district court observed that it had previously stated that ninety days was the outer limit of the reasonable time in which to file a petition for fees, but decided to allow a petition more than 300 days after SSA issued its notice of award because the law in the circuit was unsettled at the time the petition was filed, and because the attorney claimed he never received the notice of award.[78] In another case in the same district, the court granted a motion for fees made over two years after the notice of award of benefits, even though the court did not think such a time period was reasonable.[79] Rather, the court decided to give the attorney a mulligan and noted that the Social Security claimant did not object to awarding fees.[80]

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73 *Id.*

74 *See* Early v. Astrue, 295 F. App'x 916, 918–19 (10th Cir. 2008).

75 *See* Sewell v. Barnhart, No. 01-1274-JTM, 2009 WL 1870886, at *2 (D. Kan. June 29, 2009).

76 *See* Burbank v. Barnhart, No. 05-1307-JTM, 2009 WL 1870888, at *2 (D. Kan. June 29, 2009).

77 *See id.*

78 *See* Bossard v. Astrue, 612 F. Supp. 2d 1198, 1199–200 (N.D. Okla. 2009).

79 Bernal v. Astrue, 611 F. Supp. 2d 1217, 1219–21 (N.D. Okla. 2009).

80 *Id.* at 1221. The court did note, however, that the attorney's delay denied the client use

Beside the question of whether Rule 60(b)(6) is a workable solution to the timing problem, there is doubt whether its use is justified in this context. As a preliminary matter, any motion under Rule 60(b) must be made in "a reasonable time."[81] Yet the rule also imposes an additional timing limitation of one year on motions made under subparts (b)(1) through (b)(3).[82] This strongly suggests that a motion made within one of these provisions could be considered to be made within a reasonable time, even though not within one year. As a motion under 60(b)(6) is not subject to this further one-year limitation, courts that find motions for attorney's fees filed outside of a twelve-month period to be per se untimely violate the spirit of Rule 60.

Also, attorneys are not asking for relief from a judgment; they are requesting relief from the timing requirements of Rule 54. As one court has noted, a "§ 406(b) motion for attorney's fees cannot be viewed as a motion for relief from judgment without straining the meaning and purpose of a motion for relief from judgment under Rule 60."[83] The Supreme Court, in addressing a similar argument made under Rule 59—which, like Rule 60, is a tool for relief from judgment—clearly stated that "a request for attorney's fees . . . raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply."[84] The same is certainly true with respect to Rule 60.

Moreover, perfunctory motions for attorney's fees hardly seem to involve the sort of "extraordinary circumstances justifying" relief for which Rule 60(b)(6) is reserved.[85] The Supreme Court has noted that Rule 60(b)(6) should be "neither categorically available nor categorically unavailable" in all contexts.[86] Yet the Tenth Circuit's approach in *McGraw* suggests that Rule 60(b)(6) is categorically available to attorneys for fee claims, even if the motion is ultimately denied.[87] Furthermore, nothing in the Tenth Circuit's approach gives guidance to the district courts regarding what to consider when evaluating a

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of her disability money (the previously granted EAJA award that must be refunded once § 406(b) fees are awarded) for over two years. *Id.*

81 FED. R. CIV. P. 60(c)(1).

82 *Id.*

83 Bentley v. Comm'r of Soc. Sec., 524 F. Supp. 2d 921, 922 (W.D. Mich. 2007).

84 White v. N.H. Dep't of Employment Sec., 455 U.S. 445, 451 (1982) (footnote omitted); *see* Walker v. Astrue, 593 F.3d 274, 279 (3d Cir. 2010).

85 Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

86 Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863–64 (1988).

87 *See supra* text accompanying notes 72–73.

Rule 60(b)(6) motion for fees.[88] Although a good attempt, the Tenth Circuit's approach fails to solve the timing problem.

C. Other Approaches by Various Courts

While district courts within the Tenth and Eleventh Circuits, as well as some in other circuits, follow the appellate courts' approaches, most of the other district courts located in circuits that have not addressed this problem are left without guidance. Some have considered the timeliness of attorney's fee applications under other rules and doctrines. For example, a few courts have suggested that Rule 54(d)'s fourteen-day time period is applicable—following *Bergen*—but that the time between the entry of the district court's remand order and SSA's notice of award should be equitably tolled.[89] Another court has decided that applying Rule 6(b)(1)(B)'s "excusable neglect" exception to the fourteen-day filing period of Rule 54(d)(2) is appropriate, because an attorney, through no fault of his own, will not know the amount of the award at the time of remand and therefore cannot make a motion for fees within fourteen days.[90]

The foregoing approaches demonstrate the legal creativity that courts employ to avoid denying attorney's fees. Given the harm that a dilatory lawyer can cause to his clients, however, it is not unthinkable that a court may deny a motion for fees by simply holding that Rule 54(d)(2)'s fourteen-day period is literally applicable.[91] The defects of these approaches are readily apparent: they are ad hoc, ex post exercises. Except for the strict and literal application of Rule 54, most approaches provide no guidance for future conduct of attorneys and apply rules and doctrines in awkward ways. Moreover, these procedures simply deal with the timing problems when they arise. The goal should be to prevent the problems from arising in the first place.

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88 *Cf. Liljeberg*, 486 U.S. at 864 (stating that considerations of the risk of injustice to other parties in the case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining confidence in the judicial process are appropriate in Rule 60(b)(6) evaluations in judicial disqualification cases).

89 The first court to take this approach was the Eastern District of New York, in *Garland v. Astrue*, 492 F. Supp. 2d 216, 220 (E.D.N.Y. 2007) (denying a petition filed 283 days after the notice of award). Of greater impact will be the Third Circuit's decision to adopt this procedure. *See Walker*, 593 F.3d at 279–80. Unfortunately, *Walker* was decided so recently (February 2, 2010) that it is not yet possible to see how district courts in the circuit will apply the equitable tolling.

90 *See* Jeter v. Comm'r of Soc. Sec., No. 2:06-cv-81, 2009 WL 909257, at *3 (W.D. La. Apr. 3, 2009).

91 *Cf.* Bernal v. Astrue, 611 F. Supp. 2d 1217, 1220–21 (N.D. Okla. 2009) (rejecting attorney's "assertion that denial of fees on account of the delay would be punitive or draconian").

III. Possible Remedies: Judicial Expedient Versus Administrative Panacea

A. The Advantages of a Local Rule

Local rules are the best option the judiciary possesses for dealing with this problem. After all, when to file a petition for attorney's fees is an administrative question.[92] Reflecting on the advantages of such a system, one court has noted:

> The local rule device fulfills important informational purposes, placing the bar on notice of a court's policies . . . . Local rules may also alert rulemakers to the need for changes in national rules and supply an empirical basis for making such changes. Furthermore, a local rule may be a powerful implement for rationalizing diverse court practices and imposing uniformity within a given district.[93]

Local rules can prevent errant practices of particular judges,[94] relieve attorney confusion by establishing uniform practices—thereby lessening the danger that an attorney may inadvertently waive the right to her fees, and legitimize certain practices by providing notice of the applicable requirements.[95] In terms of consistency, forewarning, and clarity, a local rule that specifies the filing deadline for attorney's fees under § 406(b) is superior to individual district court judges providing case-specific or standing orders, especially as these practices have not been widely adopted. Moreover, adoption of an appropriate local rule would obviate the need for the awkward recourse to Rules 54 or 60, and would provide a clear time limit for both courts and attorneys, which is better than subjecting the timeliness of fee motions to a reasonableness analysis.

B. The Disadvantages of a Local Rule

Although local rules are the best *judicial* remedy for the timing issue, they are not the best remedy. Notwithstanding the Eleventh

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92 *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 930 (1999) ("Local rulemaking is unproblematic insofar as it deals with routine administrative matters, such as where to file and how to get access to court records.").

93 Eash v. Riggins Trucking Inc., 757 F.2d 557, 570 (3d Cir. 1985).

94 For examples of inconsistent rulings, see *supra* text accompanying notes 75–80.

95 Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 874 (1989). For an example of a district court that has established procedures to publicize proposed rules and to solicit public comment, see Local Rules, United States District Court—District of Maine, http://www.med.uscourts.gov/rules/rules.htm (last visited Mar. 21, 2010).

Circuit's exhortation, courts have largely ignored this option. Of the ninety-four U.S. district courts,[96] only nine have local rules or standing orders that specifically address when motions for attorney's fees under § 406(b) must be filed.[97] Congress has determined that all attorneys who successfully procure past-due disability benefits for their clients are entitled to reasonable fees. Yet, by definition, local rules cannot achieve a consistent, nationwide procedure.

Even when some district courts have attempted to establish timing standards specifically for § 406(b) motions, the results have been less than clear. For example, in Maryland, lawyers have thirty days from "the entry of judgment" to file a motion.[98] But what does "entry of judgment" mean? It seems unlikely that such language, which is identical to Rule 54(d), is meant to refer to SSA's award of benefits because, as discussed above, SSA normally takes more than thirty days to calculate the benefits.[99] Yet, if the phrase refers to the district court's remand order—as is most likely—the local rule may be little better than useless. Not only did the district court fail to adopt the more administratively sensible date upon which SSA gives notice of award as the beginning of the timing period, the court extended the unworkable fourteen-day period of Rule 54 to a mere thirty days.[100] The rule in the Southern District of West Virginia provides that an attorney must file a motion for fees "promptly after the plaintiff receives notice of the amount of past-due benefits."[101] While this rule

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96 In addition to the eighty-nine district courts servicing the fifty states, five other courts are located in the District of Columbia and U.S. territories. *See* Frequently Asked Questions, U.S. Courts, http://www.uscourts.gov/faq.html (last visited Mar. 21, 2010).

97 *See* Procedures For Applying For Attorney's Fees Under 42 U.S.C. §§ 406(b) and 1383(d)(2), N.D. Ga. Standing Order No. 08-03 (2008), *available at* http://www.gand.uscourts.gov/pdf/Standing_Order_08-03.pdf; E.D. & W.D. Ky. Joint Loc. R. 83.11(d); D. Me. Loc. R. 54.2; D. Md. Loc. R. 109.2(c); E.D. Mich. Loc. R. 54.2(a); D. Minn. Loc. R. 7.2(d)(2); D.S.C. Loc. Civ. R. 83.VII.07(A); S.D.W.V. Loc. R. Civ. P. 9.6. This list was compiled after searching through the local rules of every district court for any relevant rule that was—or would soon be—in force as of January 2010. Despite the author's best efforts, it is not impossible that a relevant rule was omitted inadvertently. The skeptical reader may find useful Local Court Rules, http://www.uscourts.gov/rules/distr-localrules.html (last visited Mar. 21, 2010), which provides online links to each U.S. district court's local rules.

98 D. Md. Loc. R. 109.2(c).

99 *See supra* note 26.

100 Likewise, in both of the district courts comprising Kentucky, attorneys must file a motion for attorney's fees within thirty days "of a final favorable decision." Joint Ky. Loc. R. 83.11(d).

101 S.D.W.V. Loc. R. Civ. P. 9.6. This language closely resembles the language of § 406(b), which the Eighth Circuit has held refers to the district court's judgment. Therefore, this rule suffers from the same problems as the Maryland district court's rule. No case from any of these three jurisdictions elaborates upon these local rules.

does establish SSA's notice of award as the triggering event, the phrase "promptly" is hardly self-defining.[102] A local rule that fails to give clear and consistent notice to attorneys of what the rule actually means defeats one of its primary purposes.

Moreover, even if these local rules were clear to all of the attorneys practicing *within* these districts, it hardly seems fair that a Social Security lawyer practicing in Greenbrier County is provided with this procedural guidance simply because it is located in the Southern District of West Virginia, while a lawyer practicing in neighboring Pocahontas County—part of the Northern District of West Virginia—is not.[103] For that matter, why should an attorney have less than a quarter of the time to file a petition for fees under § 406(b) in the Eastern District of Michigan than she does in a federal court in South Carolina?[104] Disparate rules among district courts are a disservice to the bar and, through it, to the disability claimants the bar serves.[105]

C. Administrative Rulemaking to the Rescue

The *best* overall option lies in Congress amending the Social Security statute and providing a firm time period during which attorneys must file petitions for fees. Unfortunately, given Congress's current preoccupation with larger issues, such as climate change, healthcare, economic stimulus, and national security, it is unlikely that a minor procedural correction in the Social Security statutes, no matter how important or sensible, will garner the attention of legislators.[106] Fortunately, Congress and the courts are not the only governmental institutions that can help solve this problem.

This Essay proposes that SSA issue a rule stating its position on the timeliness of petitions for attorney's fees filed under § 406(b). Specifically, the amendment should state a particular, reasonable pe-

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102 Unfortunately, there do not appear to be any cases in this district interpreting the meaning of "promptly" as used in the local rule.

103 *See* 28 U.S.C. § 129 (2006) (specifying counties located within the Northern and Southern Districts of West Virginia).

104 *Compare* E.D. Mich. Loc. R. 54.2(a) (allowing fourteen days after SSA award), *with* D.S.C. Loc. Civ. R. 83.VII.07(A) (allowing sixty days after SSA award).

105 Of course, lawyers must deal with the variation of judicial rules whenever they practice in more than one jurisdiction, or even when they appear before different judges within a single jurisdiction; Social Security law is not unique in this respect. The ubiquity of a problem, however, is not a sufficient reason to avoid its solution.

106 Congressional action, however, is not out of the realm of possibility. *See, e.g.*, Social Security Disability Applicants' Access to Professional Representation Act of 2010, Pub. L. No. 111-142, 124 Stat. 38 (making permanent certain fee-withholding procedures for nonattorney representatives of disability claimants before SSA).

riod in which attorneys must file for fees—thirty days seems both reasonable and popular—and should make clear that this time period runs from the date on which the attorney receives the notice of award from SSA. Most importantly, SSA should also indicate that, as a rule, it will not oppose any petition filed within this timeframe, but *will* oppose any petition filed thereafter as untimely.

Of course, SSA will have to acknowledge that it does not have the power through such a rule to require that courts accept attorneys' motions as timely. But, based on the (sometimes dispositive) deference courts seem to have given the position of SSA when determining the timeliness of these petitions,[107] it is likely that a formal rule stating SSA's position and considered rationales will induce courts to adopt the same position.

In order to encourage courts to implement its uniform rule, SSA should make clear the advantages of and reasons for its position. First, unlike district courts, which can only determine procedure for attorneys practicing in their small portion of the country, SSA can establish a policy that is clear, consistent, and uniform nationwide. Second, as a number of courts have expressly considered SSA's opinion on whether motions are timely filed, and as none have decided a timeliness matter contrary to SSA's position, this administrative rule would make official a heretofore informal practice.[108] By clarifying and formalizing this practice, SSA can induce a more efficient response from the Social Security bar. Moreover, through the formal rulemaking process, SSA can solicit input from the Social Security bar, disability claimants' organizations, and local judicial rulemaking committees across the country, thereby raising awareness of the issue and gaining valuable advice and perspectives on the problem. Lastly, SSA can make clear that its concern is not simply for those attorneys who are denied their fees but, more importantly, for disability claimants who are denied access to up to a quarter of their disability award pending a determination of what reasonable percentage should go to their attorneys' fees and what portion should be refunded to them. Though SSA has attempted to induce attorneys to file petitions in a

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107 *See, e.g.*, Burbank v. Barnhart, No. 05-1307-JTM, 2009 WL 1870888, at *2 (D. Kan. June 29, 2009); McKee v. Comm'r of Soc. Sec., No. 6:07-cv-1554-Orl-28KRS, 2008 WL 4456453, at *2 (M.D. Fla. Sept. 30, 2008); Ugorek v. Astrue, No. 3:04-cv-1119-J-TEM, 2008 WL 169737, at *1 (M.D. Fla. Jan. 17, 2008).

108 For example, the Third Circuit suggested that it would have deferred to SSA's interpretation of the appropriate timeframe for filing a fee petition under § 406(b), if SSA had but taken a position, which it declined to do. *See* Walker v. Astrue, 593 F.3d 274, 277 n.3 (3d Cir. 2010).

timely fashion,[109] the current regulatory effort has not succeeded, as the persistence of the problem in the caselaw demonstrates. Moreover, SSA has not been consistent in its position on the timeliness of motions.[110]

Therefore, by implementing and encouraging courts to follow a uniform rule, SSA may alleviate the uncertainty presently surrounding the timeliness of petitions for attorney's fees filed under § 406(b).

Conclusion

Until such time as Congress amends § 406(b) and provides a specific time period for filing for attorney's fees and the particular event at which that period begins to run, appellate courts will continue to ignore and distort the Federal Rules of Civil Procedure, district courts will continue to consider fee applications on an ad hoc basis, attorneys will continue to be denied predictable guidance (and possibly payment) in fee-petition situations, and Social Security claimants will continue to have portions of their benefits unnecessarily withheld or their ability to attract advocates for their claims impaired.[111] The local rules of district courts, by definition, are insufficient to address a nationwide problem. Given the judicial confusion and incapacity with respect to this issue, and the dim prospects of congressional action, an administrative response from SSA provides the best chance of a considered, nationally uniform, and consistent solution to the timing problem under § 406(b).

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109 *See* 20 C.F.R. § 404.1730(b)–(c) (2009) (incentivizing timely filing of fee petitions through offer of payment from SSA directly to attorneys).

110 *Compare* Jeter v. Comm'r of Soc. Sec., No. 2:06-cv-81, 2009 WL 909257, at *2 & n.2 (W.D. La. Apr. 3, 2009) (opposing attorney's motion because SSA acts as "a trustee" for claimant), *with* Miles v. Astrue, No. 03-CV-484-PJC, 2009 WL 2132723, at *2 (N.D. Okla. July 1, 2009) (declining to take a position on attorney's motion because the attorney "is not the true party in interest").

111 For the cloud of confusion hovering above fee applications surely must make attorneys wary of taking such cases.