

The Expert's Corner

SCOTUS OKAYS PERFORMANCE ENHANCEMENTS IN FEDERAL FEE SHIFTING CASES – AT LEAST IN PRINCIPLE

William B. Rubenstein*

In my column last August, I previewed a case pending in the United States Supreme Court concerning fee enhancements under federal fee-shifting statutes, *Perdue v. Kenny A.*¹ The Supreme Court decided the case on April 21, ruling that enhancements for superior performance *are* permissible under federal law. But plaintiffs' counsel should not get too excited by this result – the Court's majority identified the circumstances in which enhancements would be acceptable so narrowly that securing an enhancement is now about as easy as passing a camel through the eye of a needle. In the case before it, for example, the district court judge held that the lawyers' performance was the most exceptional he had seen in 27 years on the bench, but the Court simply dismissed this as an "impressionistic," not evidentiary, finding. Not surprisingly, the more conservative Justices (Kennedy, Roberts, Scalia, and Thomas) joined the majority opinion, written by Justice Alito, while the Court's most liberal justices (Ginsburg, Sotomayor, and Stevens) all signed an opinion concurring in part and dissenting in part, written by Justice Breyer. A few thoughts follow a review of the case.

Justice Alito's majority opinion began by embracing the lodestar approach to fees as a better alternative than a multi-factor test

¹ William Rubenstein, *Supreme Court Preview*, 3 CLASS ACTION ATT'Y FEE DIG. 307 (August 2009).

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The Facts

The underlying class action was filed in June 2002 in the Northern District of Georgia on behalf of 3,000 foster children in two Georgia counties; the suit alleged systemic deficiencies in the counties' foster care systems in violation of 42 U.S.C. § 1983 and other state and federal laws, naming various state and county officials, including the governor, as defendants. The case was referred to mediation, and the plaintiffs and state officials were able to negotiate a consent decree, which the district court approved in October 2005, though the parties were unable to agree on fees. Class counsel filed a motion for the court to award fees under 42 U.S.C. § 1988, seeking more than \$14 million: \$7.1 million to compensate the thirty-eight attorneys and paralegals for the almost 30,000 hours worked on the case, at rates ranging between \$215 to \$425 per hour, and another \$7.1 million as an enhancement for a job well done.

The federal district court (Marvin Shoob, Senior Judge) reduced the lodestar to a little over \$6 million then granted a 75% enhancement (\$4.5 million) for three articulated reasons:

- (1) the quality of service provided by counsel was far superior than consumers in the local legal market could expect to pay at the rates granted to counsel in their lodestar;
- (2) the quality of representation was "superb," far exceeding what could be reasonably expected from an attorney charging \$215 to \$425 per hour, as counsel brought a level of professionalism and skill to the litigation unseen by the court in any other case in its 27 years on the bench; and
- (3) the relief achieved for the class was "truly exceptional."

Both sides appealed. In *Kenny A. v. Perdue*, 532 F.3d 1209 (11th Cir. 2008), a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit (Carnes, Wilson, and Hill) voted unanimously to affirm the

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award (hence rejecting class counsel's concern that it was too low); the three judges also affirmed the enhancement, though they fractured significantly over their justifications for doing so – setting up the case for review by the High Court.

The Decisions

Justice Alito's majority opinion began by embracing the lodestar approach to fees as a better alternative than a multi-factor test, stating that the lodestar appropriately set the fee based on a market rate and that it is more manageable and objective than a multi-factor test.² Justice Alito then listed six principles of federal fee-shifting statutes that can be found in the Court's prior jurisprudence (emphases are mine):

1. "[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case."

2. "[T]he lodestar method yields a fee that is presumptively sufficient to achieve this objective."

3. "[A]lthough we have never sustained an enhancement of a lodestar amount for performance, we have repeatedly said that enhancements may be awarded in 'rare' and 'exceptional' circumstances."

4. "[T]he lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee and . . . an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. . . . [T]he *novelty and complexity* of a case generally *may not be used as a ground for an enhancement* because these factors 'presumably [are] fully reflected in the number of billable hours recorded by counsel.' . . . [T]he *quality of an attorney's performance* generally *should not be used to adjust the lodestar* '[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate.'"

5. "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant."

² Although neither Justice Alito nor the dissenters acknowledge this, the choice of lodestar over a multi-factor test disregards the legislative history of the federal fee shifting statute; that history points to the multi-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), as the "appropriate standards" to be used in determining a reasonable fee award. See S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976).

6. "[A] fee applicant seeking an enhancement must produce 'specific evidence' that supports the award. This requirement is essential if the lodestar method is to realize one of its chief virtues, i.e., providing a calculation that is objective and capable of being reviewed on appeal."

Applying these principles, the Court thus held that "there is a 'strong presumption' that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."

So what factor might enhance a lodestar? Only, the Court held, "superior attorney performance," not superior results, since the superior results only matter if they are the result of superior attorney performance (not, say, poor defense attorney performance). Of course, attorney performance is already accounted for in the lodestar (see #4 above) and the enhancement cannot repeat the lodestar (again #4), so *there must be something about the attorney's performance that produced superior results that is not already accounted for in the lodestar's rate*. The Court identified three such possibilities:

1. "[A]n enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors."

2. "[A]n enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted."

3. [T]here may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees.

Applying these principles to the facts of the case, the Court reversed the enhancement award and remanded for further proceedings. The Court found the trial court's enhancement method – simply granting a flat 75% enhancement – arbitrary, and although the district court had actually pegged the enhancement to

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The Court did identify three ways of arguing for an enhancement:
(1) if the attorney's lodestar rate is too simply calculated, say, using only "years out" as a measuring stick of value;
(2) if the attorney put extraordinary money into the case; or
(3) if counsel waited an extraordinary amount of time to get an award.

the factors outlined above, the Court held that it had not done so with sufficient precision. In other words, to give an enhancement for "extraordinary outlay of expenses," or "exceptional delay in the payment of fees," a judge would have to measure the precise outlay or delay and gauge the enhancement accordingly.

Justice Breyer's opinion concurred in the Court's holding that an enhancement may be based on the quality of a lawyer's performance, but dissented on two other points: noting that this was the only question presented to the Court, Justice Breyer first wrote that this is all the Court should have decided and it should not have gone on to apply the principle to the facts of the case. But as to that application, Justice Breyer re-canvassed the full record to show how the evidence fully supported the trial judge's conclusions.

Some Thoughts

At the risk of sounding like a pollyanna for plaintiffs' counsel, things could have been worse – the Court could have decided that performance enhancements were never available. The Solicitor General argued this position on behalf of the United States – and the Court rejected it. Thus, the first important lesson of *Perdue* is that enhancements for superior performance remain viable.

That said, the Court made it quite clear that such enhancements would be few and quite far between. Once again, it declined to affirm the enhancement in the case before it, preserving the Court's perfect record of never once upholding a fee enhancement in a statutory fee shifting case. The standard for enhancements the Court embraced will make it exceedingly rare that one is available, particularly as the Justices cast aspersions upon the one granted in the extraordinary case that was before them.

The Court did identify three ways of arguing for an enhancement: (1) if the attorney's lodestar rate is too simply calculated, say, using only "years out" as a measuring stick of value; (2) if the attorney put extraordinary money into the case; or (3) if counsel waited an extraordinary amount of time to get an award. Any of these provide avenues towards an enhancement. However, the real hurdle the Court set is the procedural one – namely, that the enhancement-seeker shoulders the burden of proving that an enhancement is available and that the enhancement seeker must provide specific evidence in order to meet that burden. Such a burden arguably responds to the Court's sense that the district judge's finding of remarkable lawyering here was nothing more than "impressionistic" and that his choice of a 75% enhancement was simply "arbitrary." The Court's use of a procedural hurdle here parallels the ways in which it has raised the bar for plaintiffs' counsel at the pleading stage in its recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. ___ (2009). Savvy plaintiffs' counsel will of course attempt to seek enhancements notwithstanding the narrow path available, and it will be interesting to watch this jurisprudence develop.

If there's a silver lining for the plaintiffs' bar – and believe me, you have to work hard to find one – it could be how *Perdue* arguably operates in reverse, specifically on *negative* fee multipliers. Writing about a series of such cases in these pages a few years back, I noted the following:

In a recent series of fee decisions, federal judges (and a Special Master) have penalized class counsel for a variety of problems and reduced their fee requests accordingly. While the problems themselves differ, one theme

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running through these cases is that the penalty tends to be a reduction of 50% of the fee request. It may be that a 50% reduction happens to provide the appropriate level of deterrence for a wide variety of improper timekeeping practices. Nonetheless, there is some irony in the fact that these courts are penalizing class counsel for imprecision in their fee requests—and then proceed to do so by swinging the blunt hammer of a 50% penalty. Why not 51%? Or 18%? Or 79%?³

In ridiculing the 75% enhancement in *Perdue*, Justice Alito similarly wrote:

The court increased the lodestar award by 75% but, as far as the court's opinion reveals, this figure appears to have been essentially arbitrary. Why, for example,

did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?

If courts take *Perdue* seriously, then Justice Alito's sense of the 75% enhancement being "arbitrary" ought to make the regular 50% reduction equally "arbitrary"—in other words, if enhancements can be justified only by concrete evidence and cannot be arbitrarily set, surely reductions also must be justified by concrete evidence and not arbitrarily set. This insight again grows out of the *Twombly-Iqbal* pleading arena—in raising the pleading bar, the Court made the plaintiffs' task at the motion to dismiss stage more difficult, but plaintiffs' counsel have begun to argue that *Twombly-Iqbal* standards apply, as well, to counterclaims. What's good for the goose, in other words, ought to be good for the gander.

Bottom line: *Perdue* is both a not-surprising set back for the plaintiffs' bar and a not-complete victory for the defense bar.

³ William Rubenstein, Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008).