

The Expert's Corner

SUPREME COURT ROUND-UP

William B. Rubenstein*

During the Term that just ended, the Supreme Court did not decide any cases involving class action attorneys fees, *per se*, but it did decide interesting cases about both attorney fee law and class action law – and several important cases concerning underlying substantive rights. While the plaintiffs' bar scored mild victories in the fee and class cases, the defense bar won big in cases expanding federal preemption and limiting punitive damage remedies.

Attorney Fees

The Court's lone decision addressing attorney fees, *Richlin Security Service Co. v. Chertoff*, No. 06-1717, 553 U.S. ____ (2008), resolved a circuit split concerning reimbursement for paralegal fees under the Equal Access to Justice Act ("EAJA") in a plaintiff-friendly manner. The statute permits the recovery of fees and costs for prevailing parties in administrative proceedings against the federal government. Richlin had contracted with the government to guard detainees at Los Angeles International Airport, but through mutual mistake the contracts mis-classified the plaintiff's employees' status under the Service Contract Act. Plaintiff successfully brought an administrative action seeking reformation of the contracts and was awarded fees and costs for its effort. The issue presented was how to value the paralegal fees. Plaintiff sought recovery at the rate billed by its lawyer, which no-doubt included a mark-up to the paralegal's actual pay, analogizing the award to an attorney's "fee"; the government sought to cap the recovery at the actual

amount paid to the paralegal, analogizing the award to a "cost." The Board of Contract Appeals and a divided Federal Circuit panel sided with the government, but the Supreme Court reversed.

Justice Alito, writing for a unanimous Court,¹ rejected the government's parsing of the EAJA. First, the Court held that to the extent that the statute distinguished between fees and expenses, "[s]urely paralegals are more analogous to attorneys, experts, and agents than to studies." This meant that paralegal fees should be reimbursed as are attorney fees – at the rates billed by the firm. Second, the Court reasoned that even if paralegal fees are viewed as expenses, not fees, they nonetheless should be valued at the "cost" paid by the client to the firm, not that paid by the firm to the paralegal, since the statute awards costs "incurred by that party." The Court also rejected the government's contention that allowing recovery of paralegal fees under the "attorney's fees" provision would skew incentives. The statute caps recovery of attorney fees at \$125/hour (unless an exception is obtained). The "skewed incentive" argument suggested that attorneys would shift true legal work to paralegals because they would be recovering closer to market rate notwithstanding the cap, while attorneys would not be getting their market rates. The Court found the argument unpersuasive, particularly because Congress seemed unconcerned about it in setting up the statutory framework.

Though not a class action, *Richlin* has direct consequences for class action attorney fee practice because the EAJA itself can cover fees in class actions, such as actions against the Department of Health and Human Services on behalf of Medicare recipients. More broadly, though, *Richlin* furthers the sense that paralegal fees can be the basis for attorney profit in class suits;

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¹ Justices Scalia and Thomas did not join certain portions of the opinion.

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in cases with multipliers, classifying paralegal fees as fees not costs also enables a multiplied recovery for this time. Most broadly, *Richlin* is a unanimous pro-plaintiff fee decision from a relatively conservative forum. It is likely a mistake to read too much into this, but plaintiffs' counsel should at least take heart in such a local victory from such a potentially problematic venue.

Bottom line:

a mild victory for the plaintiffs' bar.

Class Actions

The Court's lone decision touching on class action practice, *Taylor v. Sturgell*,² No. 07-371, 553 U.S. ___ (2008), was also a mild victory for plaintiffs' attorneys as the Court rejected the theory that "virtual representation" – as opposed to full-on class certification – could be broadly employed to preclude later lawsuits by different plaintiffs concerning the same subject matter as prior cases.

Taylor brought a Freedom of Information Act (FOIA) suit seeking to force the Federal Aviation Administration (FAA) to disclose certain information about the F-45 airplane. A month earlier, a friend of plaintiff's had failed in a similar suit filed by the same attorney. The district court held that Taylor's suit was precluded by the judgment in the earlier case on the grounds that Taylor's friend had "virtually represented" him in the earlier case. The first case had not been a class suit and thus all agreed that Taylor was not a formal party to it. But the D.C. Circuit embraced the concept of "virtual representation" – a concept that had also been approved by the Fourth, Eighth, and Ninth Circuits in certain circumstances – to expand preclusion. In so doing, the D.C. Circuit adopted a multi-factor test, requiring that the successive litigants have an "identity of interests" and that the later litigant was "adequately represented" in the initial suit; in addition to these two factors, at

² Disclosure: I signed an *amicus* brief in the case filed on behalf of civil procedure scholars urging reversal.

least one of three other factors had to be present: a "close relationship" between the successive litigants; "substantial participation" by the later litigant in the earlier case; or "tactical maneuvering" by the later litigant to avoid preclusion.

Writing for a unanimous Court, Justice Ginsburg rejected the concept of virtual representation and hence reversed and remanded. The Court reiterated the "deep-rooted historic tradition that everyone should have his own day in court" and stressed that generally "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Justice Ginsburg, the former civil procedure professor, did catalogue a set of six situations which might extend preclusion beyond formal parties: (1) consent to be bound; (2) pre-existing substantive legal relationships, such as assignments; (3) class actions; (4) control of the prior litigation by the later litigant; (5) later litigants who are merely proxies for the earlier plaintiff; and (6) special statutory schemes limiting re-litigation.

What the Court refused to do in this case was create a new category, as had the Circuits identified above, to pick up a variety of looser situations not fitting squarely within any of the existing exceptions to party status preclusion. Specifically, the Court noted its fear that recognizing "virtual preclusion" would essentially enable an end-run around the formal requirements of the class suit:

An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action."... That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in [prior cases] and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will."

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The Court rejected the government's argument that the case fit within any of the six existing categories and, because it rejected the virtual representation category, it reversed the D.C. Circuit and remanded for reinstatement of the plaintiff's case.

The case is a victory for plaintiffs' counsel on a variety of levels. First, most locally, the second FOIA case here will get to go forward and plaintiff #2 will have a fresh opportunity to convince a judge to come out differently than did the judge in the first case; this is particularly useful in FOIA actions as such cases are filed throughout the country and may well reach jurists with differing orientations towards the government's position. That said, once several courts have repeatedly upheld the government's position on some particular FOIA request, it becomes increasingly unlikely a later judge will defect – hence this reality becomes practically conclusive even where virtual representation cannot do the job. *Sturgell* is also a victory for plaintiffs' lawyers more generally (beyond the FOIA context) in limiting preclusion and enabling re-litigation.

If there are any worrisome notes in the opinion for plaintiffs' counsel these may be the facts (1) that Justice Ginsburg's six category exposition lays out a roadmap for those seeking to employ preclusion in the future; and (2) that the case puts greater importance on the class certification decision and might, indirectly, make courts more careful about granting it in future cases.

Bottom line, though:

another mild victory for the plaintiffs' bar.

Preemption of State Product Liability Law

In *Riegel v. Medtronic Inc.*, No. 06-179, 552 U.S. ____ (2008), the Court ruled that FDA approval of a medical device preempts state common law causes of action related to the safety or effectiveness of that device. A balloon catheter produced by defendant exploded

in plaintiff's heart after plaintiff's doctor inflated the catheter to an amount higher than its stated limits and in clinical circumstances contraindicated on the packaging. Defendant argued that plaintiff's New York common law claims were preempted by the Medical Device Amendments of 1976 (MDA), which preempt any state "requirement" that "is different from, or in addition to" federal requirements and "relates to the safety or effectiveness of the device." Reasoning that the federal pre-approval process for devices created federal requirements and that the "common-law causes of action for negligence and strict liability" at issue "impose [differing] requirements," the Court held that common law causes of action arising from the catheter's failure were preempted by the MDA.

This decision deprives plaintiffs' attorneys of perhaps their most significant weapon – state tort laws – in many FDA-related lawsuits. Its impact on the plaintiffs' bar could be tremendous, particularly if it is a harbinger of further preemption decisions. One such case was also before the Court this Term but yielded a 4-4 outcome and hence no decision. That case, *Warner-Lambert Co., LLC v. Kent*, No. 06-1498, 552 U.S. ____ (2008), involved a Michigan statute which provides immunity from state law claims to drug manufacturers if the drug in question received FDA approval, though no immunity exists if FDA approval was obtained through misrepresentation. The Second Circuit, disagreeing with the Sixth, held that this exception to immunity was not impliedly preempted by federal law nor by the Court's rejection of "fraud on the FDA" claims in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). The Court's stalemate leaves the Second Circuit's decision in place and suggests that the Court's eagerness to broadly read express preemption clauses is greater than its eagerness to find implied preemption. In the coming 2008-2009 Term, the Court will hear two additional preemption cases, *Wyeth v. Levine* and *Altria Group v. Good*. In *Levine*, the Court will decide whether state failure-to-warn claims are preempted by compliance with FDA labeling requirements, and in *Good* the Court

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will decide whether the Federal Cigarette Labeling and Advertising Act and FTC approval preempt state misrepresentation claims stemming from statements about “light” cigarettes. If this Term’s *Riegel* decision creates a trend toward ruling out state product liability law causes of actions, next Term’s cases look especially ominous for the plaintiffs’ bar, particularly because *Levine* involves FDA drug approval, while *Riegel* dealt only with the less capacious field of medical devices.

Bottom line:

defendant victory, likely to signal more.

Punitive Damages

In *Exxon Shipping Co. v. Baker*, No. 07-219, 554 U.S. ____ (2008), the Court actually rejected the argument that the federal Clean Water Act’s water pollution penalties preempted punitive damage awards in maritime spill cases – but there was little else for the plaintiffs’ bar to cheer here. The Court went on to reverse a \$5 billion jury-based punitive damage award (remitted by the trial judge to \$2.5 billion) against Exxon arising out of the 1989 Valdez oil spill in Alaska’s Prince William Sound. The Court held that the award was excessive as a matter of maritime common law and suggested that awards should be limited to a 1:1 ratio with compensatory damages.

The decision itself is technically about maritime common law and hence will have little direct precedential impact beyond that field. However, as the Court’s most recent pronouncement on punitive damages, it continues a limiting trend that runs through a series of recent cases. Most frightening for plaintiffs’ counsel, the Court’s prior ruling on ratios – *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), had identified a 9:1 ratio as a plausible upward boundary

on punitive damages. *Baker* reined in that ratio to the tighter 1:1 relationship by utilizing data from recent cases suggesting median punitive damage awards tend to be in this range. *Baker* is fully incomprehensible in its logic – it both imagines punitive damages are meant to “punish” but then limits the amount that can be charged against any defendant to a “median” even though what might be sufficient punishment for one defendant has no necessary relationship to what would be sufficient to punish another. Would the “median” punitive damage award for drunk driving “punish” Bill Gates? Why should a “median” be expected to “punish” Exxon, which, according to Fortune, is the second largest company (after Wal-Mart) in the entire world? Despite its lack of logic, however, *Baker* signals the Court’s continued oversight (meaning lowering) of plaintiff damage awards.

Bottom line:

big defendant victory.

Conclusion

The 2007-2008 Supreme Court Term involved no cases directly addressing class action attorney fees. However, the Court did confirm the recoverability of market-rate paralegal fees in EAJA cases, and it also reinforced the validity of the class action mechanism, though perhaps in a way which will elevate the procedural bars to class certification. The Court also reiterated its willingness to preempt state tort and regulatory law and signaled its continued tough review of punitive damage awards. As a result of these decisions, class action attorneys may find themselves confined to federal sources of law for many otherwise viable causes of action, and they may find themselves increasingly forced to defend significant punitive damage awards.