

The Expert's Corner

SUPREME COURT ROUND-UP

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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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