

## The Expert's Corner

### SUPREME COURT PREVIEW

William B. Rubenstein\*

In last month's column, I discussed cases from the Supreme Court's 2008 Term that had important implications for class action law, noting that no case last Term confronted class action fees directly. In the upcoming 2009 Supreme Court Term, however, the Court will take up a case directly on point – *Perdue v. Kenny A.*, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3557 (U.S. Apr. 6, 2009) (No. 08-970) – with oral arguments scheduled for October 14. The case concerns the issue of lodestar enhancements in federal statutory fee-shifting cases. The question for which the Supreme Court granted certiorari is whether an enhancement to a fee award made under 42 U.S.C. §1988 can be based on the *quality of performance* or the *results obtained*, or whether these factors are already accounted for in the lodestar itself.

#### The Case

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 settlement, 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.

#### **District Court:**

*attorney fee hours were excessive and  
billing entries were vague  
but  
quality of counsel's service was superior,  
quality of representation was superb, and  
relief achieved was truly exceptional.*

The federal district court (Marvin Shoob, Senior Judge) took a two-step approach to the fee award. *First*, after examining the 2,500 pages of billing records submitted by class counsel to support its \$7.1 million lodestar, the district court found some billing entries to be vague and excessive and slashed the hours worked by 16% across the board, while leaving the requested billing rates intact. This reduced the lodestar to a little over \$6 million. *Second*, the court granted a \$4.5 million enhancement, though this was significantly less than the \$7.1 million class counsel requested. The court provided three justifications for the enhancement:

- (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

(continued on page 308)

\*William B. Rubenstein, a law professor at Harvard Law School, specializes in class action law; he has litigated, and regularly writes about, consults, and serves as an expert witness in class action cases, particularly on fee-related issues. Professor Rubenstein's work can be found at [www.billrubenstein.com](http://www.billrubenstein.com). The opinions expressed in this article are solely those of the author.