

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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