

The Expert's Corner

SUPREME COURT ROUND-UP

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This past Term, the Court decided a series of cases that will interest class action litigators: two concern attorney's fees, two concern class action practice, three concern jurisdiction (one regarding jurisdiction in securities class actions) and a few others concern miscellaneous matters. None of the decisions was earth-shattering, but my scorecard (summarized at the end of the article) suggests that the plaintiffs' bar has a slight edge in the year's outcomes. Here's an overview.

FEE DECISIONS

1. *Perdue v. Kenny A*, No. 08-970, 559 U.S. ____ (2010) was the most important fee decision of the Term, one I discussed in my April column. The Court's 5-4 decision was both a not-surprising setback for the plaintiffs' bar and a not-complete victory for the defense bar. The Court held that for the calculation of an attorney's fee under federal fee shifting statutes, enhancements for superior performance are permissible in extraordinary circumstances, but only if: (1) the lodestar calculation was tied to a rubric that did not reflect the attorney's true market value; (2) the attorney put in an extraordinary outlay of money; or (3) there was an exceptional delay in the payment of fees.

Plaintiffs in the case, children in the Georgia foster care system and their next friends, filed a class action on behalf of 3000 foster children in two Georgia

counties, charging various Georgia state and county officials with perpetuating a foster care system with systemic deficiencies in violation of 42 U.S.C. § 1983. Plaintiffs and state officials were able to negotiate a consent decree in mediation, but not agree on fees. Class counsel filed a motion for fees under 42 U.S.C. § 1988, seeking \$7.1 million in fees to compensate the 38 attorneys and paralegals for working 30,000 hours, at rates ranging between \$215 to \$425 per hour. Class counsel also sought an additional \$7.1 million as an enhancement for an extraordinary performance. The trial court reduced the lodestar to a little over \$6 million and granted a 75% enhancement (\$4.5 million), noting that plaintiff attorney's performance was the best he had seen in his 27 years on the bench and that the class received exceptional relief. On appeal, the Eleventh Circuit voted unanimously to affirm the award.

Reversing, the Supreme Court's majority, speaking through Justice Alito, began by embracing the lodestar approach as a more manageable and objective alternative to the multi-factor test. The majority found that enhancements to the lodestar figure are permissible only for superior attorney performance not accounted for in the lodestar calculation; superior results do not count as they could easily be the product of luck or of a bad defense. The enhancement-seeker shoulders the burden of proving the enhancement is available and must produce specific evidence to meet that burden. The majority stressed that when granting enhancements in the three above-mentioned situations where they are appropriate, courts should use a calculation that is both objective and reasonable, such as tying the enhancement to an objective number like a market rate or a standard rate of interest. The Court reversed the enhancement

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