The Expert's Corner

Supreme Court Preview

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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

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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 twenty-seven years on the bench; and

(3) the relief achieved for the class was "truly exceptional."

All told, after the 16% reduction in the lodestar, and the $4.5 million enhancement, the district court awarded plaintiffs' counsel with a total fee award of over $10.5 million.

The Appeal

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 award (hence rejecting class counsel's concern that it was too low); the three judges also affirmed the enhancement, though they fractured significantly over their justifications for doing so.

The key question in the Eleventh Circuit concerned the meaning of prior Supreme Court precedent on the enhanceability of statutory fee awards. Judge Carnes quoted the High Court's decision in *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992), stating that the lodestar is "the guiding light of [the court's] fee shifting jurisprudence" and that there is to be a "strong presumption" that the lodestar is reasonable and thus that any enhancement is unnecessary; and he emphasized that an earlier Supreme Court opinion, *Pennsylvania v. Del. Valley Citizens' Council for Clean Air (Delaware Valley I),* 478 U.S. 546, 565 (1986), held that this strong presumption of reasonableness can only be rebutted in "rare" and "exceptional" cases. Thus, Judge Carnes reasoned, only in cases where the lodestar alone would be unreasonable should an enhancement be awarded. Judge Carnes believed that this was not one of those "rare" and "exceptional" cases that the Supreme Court had in mind. One of his principle problems with using the "superb" representation by class counsel as a justification for a lodestar enhancement was that he believed this to be already accounted for in counsel's hourly rate used to compute the basic lodestar. To take this into account again, he argued, would be double counting, and "[d]ouble counting simply is not allowed." *Perdue*, 532 F.3d at 1226 (Opinion of Carnes, J.). And yet, Judge Carnes' lengthy discussion of Supreme Court precedent was rendered meaningless when he concluded (in a position joined by Judge Hill) that two prior Eleventh Circuit decisions[1] required that he uphold the enhancement because these earlier precedents were binding on this panel. *Id*. at 1238. In those earlier cases, the Eleventh Circuit had vacated and remanded district court orders denying enhancements based on superior results and had held that superior results and performance *could* justify an enhancement to the lodestar.

> ***Eleventh Circuit panel:***
> *was concerned with the meaning of prior Supreme Court precedent on the enhanceability of statutory fee awards.*

Judge Wilson's view of the Supreme Court precedent was more capacious – he emphasized that all the judges read that precedent as permitting enhancements in exceptional cases and he read those cases as not foreclosing enhancements based on quality of representation and exceptional results. *Id*. at 1243. He thus voted to affirm the enhancement on the merits of the issue, not solely because of the earlier binding Eleventh Circuit precedent.

1 *NAACP v. City of Evergreen,* 812 F.2d 1332 (11th Cir. 1987); *Norman v. Housing Authority of Montgomery,* 836 F.2d 1292 (11th Cir. 1988).

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The Supreme Court Showdown

The Eleventh Circuit declined to rehear the case en banc, *Kenny A. v. Perdue,* 547 F.3d 1319, *rehearing denied*, (11th Cir. 2008), and the Supreme Court granted certiorari on April 6, 2009, with arguments scheduled for October 14.

The petitioners, the governor of Georgia and other state officials, engage in a two-pronged attack on the lower courts' decisions. In their brief on the merits, they first assert that the statutory language and purpose of § 1988 do not support any enhancement at all, including enhancements given for results obtained and quality of representation. Brief of Petitioner at 18, *Perdue v. Kenny A.,* No. 08-970 (June 22, 2009). The petitioners point out that there is nothing in the text of the statute which even makes mention of an enhancement, referring only to a "reasonable attorney's fee." *Id*. at 19. And, catering to the members of the Court who view legislative history as a legitimate indication of Congressional intent, the petitioners cite various House and Senate reports which all indicate that the purpose of the statute was to "attract competent counsel without providing windfalls to attorneys."

> ***U.S. Supreme Court:***
> *will address the question of 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...*

After making their statutory argument, the petitioners assert that even if the statute allows for an enhancement based on superior results and quality of representation, the Supreme Court's previous line of cases on the subject decidedly does not. The petitioners specially focus in on the Court's holding and relevant language in *Delaware Valley I*, that there is a "strong presumption" that the lodestar is reasonable and that "elimination of a large number of hours of the grounds that they were unreasonable…is not supportive of the court's later conclusion that the remaining hours represented work of superior quality." *Delaware Valley I,* 478 U.S. at 567 (internal citation omitted). Like Judge Carnes' opinion in the circuit court, the petitioners assert that if the district court reduced the lodestar by 16%, then it could not subsequently grant an enhancement based on superior quality of representation.

The petitioners also attack the district court's anecdotal justifications for the enhancement, urging the court to adopt the bright line rule that no enhancements based on superior performance are permitted under the fee-shifting statute, as opposed to the vague "exceptional" standard now in place.

Though the respondents have yet to file their brief on the merits, we can anticipate what positions they may take based on their brief opposing certiorari. For their part, respondents seize on the "rare" and "exceptional" language in *Delaware Valley I* and assert that if ever there was a cause for an enhanced fee award, this would be it. Brief of Respondents in Opposition to Petition for Certiorari at 11-12, *Perdue v. Kenny A.,* No. 08-970 (March 4, 2009). Respondents assert that in the seventeen years since *Dague* was decided (establishing the strong presumption of reasonableness of the lodestar), the petitioners have identified only nine cases in which fee applicants have obtained an enhancement which has been upheld on appeal. *Id*. at 23. Thus, enhancements truly are rare and do not routinely result in windfalls to class attorneys (if that is what Congress feared).

Second, respondents contend the district court judge carefully analyzed the factors and the "rare" and "exceptional" standard, and determined that the quality of the representation in this case was so superb and the results so exceptional as to require an enhancement of the lodestar in order to arrive at a "reasonable attorney's fee" as required by § 1988. *Id*. at 30.

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The Implications

Perdue is a huge case for a variety of reasons.

First, whatever the Court holds about enhancements is likely to apply to all federal fee statutes. For this reason, dozens of states attorneys general and the United States itself have filed *amicus* briefs – all in support of limiting enhancements.

Second, the Court could well embrace the position of the Solicitor General, namely that "[f]ederal fee-shifting statutes do not authorize enhancement above the lodestar amount based on the quality of representation or the results obtained for a simple reason – because both factors are already incorporated into the lodestar calculation." Brief for the United States as Amicus Curiae Supporting Petitioners at 8. Such a result would make enhancements in statutory fee cases even more difficult to obtain than they presently are.

> *In this economic climate, will Congress amend federal statutes to permit fee enhancements – particularly where these enhancements will be called "windfalls" for plaintiffs' attorneys?*

Third, even more globally, the Court could go so far as to hold that fee enhancements are not authorized by federal statutes at all, though this result would seem to exceed the question presented by the cert. petition and reverse earlier precedent recognizing the availability of enhancements in exceptional circumstances.

Of course, any of these outcomes is alterable by Congress since the fee-shifting is statutory in nature. However, it is difficult to imagine Congress, in this economic climate, amending federal statutes to permit fee enhancements – particularly where these enhancements will be called "windfalls" for plaintiffs' attorneys.

Are they though? My own opinion is that they are not for at least four reasons. *First*, it is not true that the lodestar will invariably capture superior performance. If good performance comes through extra hours, these will be in the lodestar (assuming the trial court accepts the hours). But if good performance comes through extraordinarily lawyering without extra hours, the argument has to be that this performance is captured by a higher billing rate. However, billing rates tend to track years out of law school, not skill, and the former is a rough proxy for the latter. So if a young lawyer has a brilliant idea, this really won't be captured in the lodestar. *Second*, it is also not evident to me that a case's results are reflected in the lodestar – again, the presumption must be that the hours worked track the results obtained (more hours better result). But that assumption may not apply in particular cases. *Third*, once it is appreciated that neither performance nor results are necessarily captured by the lodestar, the policy implications of packing everything into the lodestar begin to emerge: counsel will have enormous incentive to run up their lodestar even in cases where good performance and great results might mean they do not have to do so. Why have a brilliant idea, especially if you are a young lawyer, if it may cut short the case, lower the fee, and not be rewarded in any way?

Finally, and most globally, enhancements are not really enhancements because hourly rates are not really hourly rates. The hourly rates in fee-shifting cases tend to be those that prevail in the community, meaning those charged by lawyers with paying clients, typically defense attorneys. But when a defense attorney charges $500/hour, she is confident she will collect $500/hour – there is no risk embedded in that lodestar. (Well, there's a small chance that a firm's clients will stiff the firm their fee, but that small risk is likely already reflected in the $500/hour fee). By contrast, plaintiffs' attorneys take significantly greater risks with their time, so to pay

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them a "no risk" fee when they prevail is to underpay them. Others will argue – Justice Scalia has – that to pay an enhancement for risk overpays because the risk is reflected in the lodestar (in that tougher cases take more hours to win) and/or it will encourage lawyers to take bad cases by paying them the same amount as when they take good cases.[2] But I do not find either argument fully convincing. Tougher cases may or may not take more time; lawyers may or may not gravitate toward long shot cases (and, depending upon the social values involved, if they do, that might be something to reward). In short, risk is better conceptualized as the uphill battle that plaintiffs have generally (with the burden of proof) and that civil rights plaintiffs (those in fee-shifting cases) have in particular – and it ought to be compensated.

If there's any doubt that risk can – and should – be compensated in a fee regime, that doubt is settled in the analogous field with which we are all so familiar: common fund fee awards. Common fund fee awards are awards in which enhancements (called multipliers) are much more regularly granted. Most circuits make lodestar multipliers available based precisely on the types of factors the Court is considering outlawing in the statutory fee context.[3] To be sure, the common fund fee award starts as a percentage award not specifically dependent on any of these factors. However, the percentage award is typically "cross-checked" by the lodestar and then adjusted with a multiplier, so the lodestar-enhancement analysis appears in the common fund case just as it does in the statutory case. If it makes sense in the latter, I'm not sure why it does not make sense in the former. (Though others might agree that the two scenarios have much in common, but argue for the opposite equal treatment of them: to wit, if the Court's decision in *Perdue* restricts enhancements on a basis like that proposed by the United States – because performance and results are already a part of the lodestar fee – you might look for these arguments to begin to emerge in common fund cases.)

Let me close with an anecdote. Before entering academia and focusing on class actions and fee issues, I was a plaintiffs' attorney employed by the ACLU's national office essentially litigating fee-shifting cases like those at issue in *Perdue* (indeed, one of my former ACLU colleagues, Marcia Robinson Lowry, is the counsel of record for the plaintiffs in *Perdue*). I've always been struck by the struggle plaintiffs' public interest lawyers have to go through to get paid – prevailing, in a case with a fee-shifting statute, then putting in a lodestar-based fee petition which is often contested and usually cut by the trial judge, and all to get a relatively modest hourly rate in the few winning cases. Worse, these lawyers get paid an annual salary wildly below market rates, a fact that encourages judges to concern themselves even less with the fee petitions of public interest organizations. The organizations then have to support themselves with private donations – and those donations are seen as yet another reason not to shift fees or to do so stingily. By contrast, common fund plaintiff attorneys get nice percentage awards in prevailing cases, often un-contested, and often with multipliers acknowledging their risk. My own conclusion, if not yet obvious, is not that the common fund lawyers are generally over-paid (though they might be in particular cases) but rather that the fee-shifting lodestar lawyers are wildly under-paid (quite regularly).

And I fear that it's likely they will lose *Perdue* to boot.

2 *City of Burlington v. Dague,* 505 U.S. at 562-63.

3 *See, e.g., In re Prudential Ins.Co.America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 340 (3rd Cir. 1998) ("[m]ultipliers may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result"). To the extent common fund multipliers are based on the risk of non-recovery, the Supreme Court has already ruled that that factor cannot enhance a fee-shifted statutory fee. *See City of Burlington v. Dague,* 505 U.S. 557, 567 (1991) (holding that "enhancement for contingency is not permitted under the fee-shifting statutes at issue").