

## The Expert's Corner

### SUPREME COURT ROUND-UP

William B. Rubenstein\*

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

*\*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. Kristin Hucek, Harvard Law School Class of 2011, assisted in the preparation of this column.*

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award in this case on the grounds that the trial court's flat 75% calculation was arbitrary.

The first important lesson of *Perdue* is that enhancements for superior performance remain viable. That said, the Court made it clear that enhancements would be few and quite far between. The Court has set a procedural hurdle by requiring enhancement-seekers to provide specific evidence of the enhancement they deserve, much in the same way the Court has raised the bar for plaintiff's counsel in the pleading stage in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. \_\_\_ (2009). While there is little here to cheer about for the plaintiffs' bar, I argued in my April column that *Perdue*'s procedural reasoning concerning the requirement for specific evidence for a *positive* fee multiplier ought to apply equally to courts' evaluations of *negative* fee multipliers.

2. In *Hardt v. Reliance Standard Life Insurance Co.*, No. 09-448, 560 U.S. \_\_\_ (2010), the Court ruled that under ERISA §1132(g)(1), a court "in its discretion" may award fees and costs "to either party," as long as the fee claimant has achieved "some degree of success on the merits." Plaintiff Hardt sued Reliance Insurance Company for wrongfully denying her claim for benefits. The District Court found that Hardt did not receive the review to which she was entitled under ERISA, and ordered Reliance to conduct a proper review. Upon performing the court-ordered review, Reliance found that Hardt qualified for coverage. Hardt moved for attorney's fees under ERISA §1132(g)(1), which makes "reasonable attorney's fee and costs" available "to either party" at the court's "discretion."

The District Court awarded fees pursuant to Fourth Circuit precedent, finding that Hardt was a "prevailing party" and that she satisfied five other factors. The Fourth Circuit vacated the order on the grounds that Hardt had failed to establish that she was a "prevailing party." The Supreme Court, per Thomas, J., struck down the Fourth Circuit's test on the basis of the statutory text,

finding that the words "prevailing party" do not appear in §1132(g)(1), and that §1132(g)(1) expressly grants district courts "discretion" to award attorney's fees "to either party." The Court held that *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1980) – the principal case on fee-shifting statutes that do not limit fees awards to the "prevailing party" – offers the correct standard in this case: fee claimants must achieve "some degree of success on the merits" to be eligible for a fees award.

The Court found that Hardt had achieved "some degree of success on the merits" because the District Court found that Hardt "did not get the kind of review to which she was entitled" under ERISA and was "inclined to rule in Ms. Hardt's favor;" Hardt obtained a judicial order instructing Reliance to review her application within 30 days, "otherwise, judgment will be issued in favor of Ms. Hardt;" and consistent with the District Court's appraisal, Reliance reversed its decision and awarded Hardt the benefits she sought.

While *Hardt* involves interpretation of but one statute, the conservative Justices' textualism here worked in favor of plaintiffs' attorneys, removing from Fourth Circuit fee jurisprudence an obstacle to fees not found in the statute.

## CLASS ACTION DECISIONS

3. In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 559 U.S. \_\_\_ (2010), the Court held, 5-4, that N.Y. Civ. Prac. Law. Ann. §901(b), which prohibits class certification in cases seeking to recover certain "penalties" (like statutory interest), did not prevent a federal court sitting in diversity from certifying a class action seeking statutory interest under Rule 23. The plaintiff, a medical practice, filed a class action to recover from defendant Allstate Insurance the unpaid statutory interest that had accrued as a result of Allstate's late payment of claims. The District Court held that the suit could not proceed as a class action since it was required to apply §901(b). The Second Circuit affirmed, holding that §901(b) did not conflict with

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Rule 23 as §901(b) addressed the antecedent question to class certification of whether plaintiffs could bring this type of claim in the first place.

Reversing, the Supreme Court majority, speaking through Justice Scalia, found that §901(b) and Rule 23 both answer the same question of whether a suit can proceed as a class action. The majority rejected the dissent's argument that despite the statute's language, the legislature's intent in enacting §901(b) was to restrict the types of *remedies* plaintiffs could pursue, not to restrict the maintenance of class actions. Because §901(b) and Rule 23 both answer the same "certifiability" question, the Supremacy Clause holds that the federal rule governs (so long as it is not unconstitutional) and hence New York state's limitation had to yield.

This ruling is remarkable. It suggests that certain state legislative attempts at limiting class action damages can be avoided by filing in federal court. This is a triumph for plaintiffs' lawyers and a triumph of federal over state courts – all brought to you by Justice Scalia. Even more amazing is the fact that most commentators have seen Congress's enactment of CAFA, which moves many state class actions to federal court, as a conservative mechanism meant to limit class actions given federal judges' likely hostility to them. Here the move to federal court enabled more not less certification (and money damages). The decision may be less important than it seems as states can avoid it simply by capping aggregate damages rather than capping class certification in statutory damage cases. In this sense, it is just a skirmish in the larger war over the relationship between class actions and statutory damages – but a skirmish that the plaintiffs' bar won nonetheless.

4. In *Stolt-Nielsen S.A. et al v. AnimalFeeds International Corp.*, No. 08-1198, 559 U.S. \_\_\_\_ (2010), the Court held 5-3 that the imposition of class arbitration on parties whose arbitration clauses are "silent" on that issue violates the Federal Arbitration Act. The petitioners were shipping companies hired by the respondents to transport their goods, whose charter

governing their shipments included an arbitration clause that did not mention class arbitration. AnimalFeeds brought an antitrust class action against the respondents, which was consolidated with other similar suits by the Judicial Panel on Multidistrict Litigation, and then served the petitioners with a demand for class arbitration. The selected arbitrators concluded that the arbitration clause allowed class arbitration, since it did not mention it, but stayed the proceedings to allow the parties to seek judicial review.

The majority reversed the arbitrator's conclusion, finding that it was inappropriately based on public policy arguments, rather than whether the Federal Arbitration Act or either of the two potentially controlling bodies of law contained a "default rule" under which an arbitration clause would allow class arbitration in the absence of consent. The Court held that the FAA's emphasis on the parties' consent, intentions, and structuring of how and with whom they would arbitrate demonstrates that, in cases where a clause is silent, class arbitration cannot be imposed without consent. The court noted that consent to class arbitration could be implied by the context of the agreement, rather than stated explicitly, but could not be inferred from a simple agreement to arbitrate. The dissent argued that arbitration clauses were merely a form of forum-selection clause, and that the class action prospect should not change simply because the forum has.

This case is a minimal invasion into the murky area of class action arbitration. It is likely to impede the progress of that form of dispute resolution, given that it now seems that arbitration clauses (at least in the business context) must explicitly reference it. Companies might respond by writing class arbitration into their arbitration clauses, though of course historically their emphasis has been to require arbitration but ban class suits. Class action arbitration continues to loom over the class action field as a grand potential, but one fully un-theorized and one unlikely ever to be truly realized.

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## JURISDICTION DECISIONS

5. In *Morrison v. National Australia Bank Ltd.*, No. 08-1191, 561 U.S. \_\_\_\_ (2010), the Court held that foreign plaintiffs suing foreign defendants for violations of American securities law based on securities transactions in foreign countries failed to state a claim on which relief can be granted. Three years after National Australia Bank (National) bought HomeSide, a mortgage servicing company headquartered in Florida, National wrote down the value of HomeSide's assets, causing National's share prices to fall. Australian plaintiffs, who had purchased National's shares prior to the write-downs, sued National Australia Bank and HomeSide for violations of 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, alleging that HomeSide had manipulated its financial models and that National was aware of the deception. National and HomeSide moved to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) and for failure to state a claim under 12(b)(6). The District Court dismissed for lack of jurisdiction under 12(b)(1), finding that the domestic acts were, "at most, a link in a securities fraud that culminated abroad." The Second Circuit affirmed.

The Supreme Court, however, found that the District Court did have subject matter jurisdiction under 15 U.S.C. 78aa ("The district courts... shall have exclusive jurisdiction of violations of [the Exchange Act]") to adjudicate the question of whether 10(b) applies to National's conduct. The Court determined, from a lengthy textual analysis of 10(b), that 10(b) does not apply abroad because it contains no suggestions of application abroad that would defeat the presumption against extraterritoriality. The Court further rejected the petitioner's arguments that the Act should apply because the deceptive conduct occurred in the United States, stating that the focus of the Securities Exchange Act is not on the place of deception, but upon the purchases and sales of securities in the United States. Section

10(b), the Court noted, does not punish any deceptive conduct, but only deceptive conduct in connection with the purchase or sale of a security listed on an American stock exchange or the purchase or sale of any other security in the United States. This case involved no securities listed on a domestic exchange, and all aspects of the purchase occurred outside the US, and therefore petitioners had no cause of action.

6. In *Hertz Corp. v. Friend et al.*, No. 08-1107, 559 U.S. \_\_\_\_ (2010), the Court issued a unanimous decision (written by Justice Breyer) holding that for the purpose of determining corporate citizenship for federal diversity jurisdiction, the phrase "principal place of business" in 28 U.S.C. §1332 should be read as the place where a corporation's officers direct, control, and coordinate the corporation's activities – the "nerve center." The case originated in a class action suit filed against Hertz Corp. in a California state court for violations of California's wage and hour laws. Hertz sought to remove to federal court, as the plaintiffs were California citizens, while its "principle place of business" was in New Jersey, due to the fact that its leadership and administrative operations were located there. However, the District Court concluded, based on Ninth Circuit precedent that examined the amount of a business's activities in California relative to other states, that Hertz was a California citizen, and ordered the case remanded back to state court.

The Court looked to the Seventh Circuit's analysis of the corporation's "nerve center" as the best interpretation of "principal place of business," as it matched the statutory language's implication of a single, prominent place within a state, provided administrative simplicity by allowing for efficiency and predictability, and correlated with legislative history suggesting that the words should be read as a simple test. The Court recognized that this test could lead to irrational results in certain cases – if a business had the bulk of its activities in New Jersey and only its headquarters in New York, it would still be considered a New York citizen – but

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found that the virtues of a clear and simple rule justified occasional anomalies.

7. In *Reed Elsevier, Inc. v. Muchnick*, No. 08-103, 559 U.S. \_\_\_\_ (2010), in a consolidated copyright infringement class action, the Second Circuit *sua sponte* raised the question of whether §411(a) of the Copyright Act, which generally requires plaintiffs to register their copyrights prior to filing an infringement claim, deprived the federal courts of subject-matter jurisdiction over infringement claims involving unregistered works. The Supreme Court held that §411(a)'s registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction on infringement claims, such that the District Court had the authority to adjudicate the parties' request to approve their settlement.

## MISCELLANEOUS DECISIONS

8. In *Krupski v. Costa Crociere S.P.A.*, No. 09-337, 560 U.S. \_\_\_\_ (2010), the Court held 8-0, with Justice Scalia filing a concurring opinion, that Federal Rule of Civil Procedure 15(c) allowed the late filing of an amended pleading "related back" to a timely filed original pleading if the prospective defendant knew or should have known that it would have been named as a defendant but for a mistake, and that the plaintiff's mere knowledge of the defendant did not indicate the absence of such a mistake.

9. In *Mohawk Indus. v. Carpenter*, No. 08-768, 558 U.S. \_\_\_\_ (2009), the Court held, 9-0, that disclosure orders adverse to attorney-client privilege do not qualify for immediate appeal under the collateral-order doctrine

because (1) lack of immediate appeal will not harm the public interest of maintaining attorney-client privilege; and (2) alternative avenues of immediate appeal exist.

10. In *South Carolina v. North Carolina*, No. 138, Orig., 558 U.S. \_\_\_\_ (2010), the Court issued a 5-4 decision holding that non-state entities could intervene in actions between States arising under the Supreme Court's original jurisdiction if they had compelling interests not represented by the involved States.

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The Court's decision in *Shady Grove* (enforcing Rule 23's certification standard over New York's limitation on class actions in a New York law based class suit) is the most significant decision of the Term and a victory for the plaintiffs' bar. It suggests that state law limitations on class suits can be avoided by filing in federal court unless they are drafted in ways so as not to conflict with federal law. Its import may well trump the plaintiffs' bar's losses this Term – the limitation on enhancements announced in *Perdue*, the limitations on foreign securities cases outlined in *Morrison*, and *Stolt-Nielsen*'s limitations on class action arbitrations. These decisions are all fairly bad for plaintiffs' lawyers, but none were unsurprising: enhancements in federal fee-shifting cases have long been too difficult to achieve; foreign securities cases had yet to find a secure foothold here; and class action arbitration is still a big unknown. The plaintiff-friendly ERISA fee decision (*Hardt*), although relegated to particular statutory settings, adds a final thumb on the scale in the plaintiffs' bar's favor this Term.