



## Alerts

### U.S. Supreme Court Strictly Limits Enhancements of Attorney Fee Awards Above Lodestar Amounts

April 29, 2010

*Lawyers for the Profession® Alert*

*Perdue v. Kenny A. ex rel. Winn*, \_\_\_ S. Ct. \_\_\_, 2010 WL 1558980 (April 21, 2010)

#### Brief Summary

The United States Supreme Court (5-4) held that attorney fee awards may be enhanced under 42 U.S.C. § 1988 only in the rare circumstance of when the lodestar method fails to account for certain factors relevant to a fee award. The district court's enhancement was improper in the matter because it failed to use an objective and reviewable methodology to calculate its enhanced award.

#### Complete Summary

Plaintiffs (children in the Georgia foster-care system) successfully mediated a civil rights class action against various Georgia state officials. But the consent decree did not resolve the amount of prevailing party attorney fees. The relevant fee shifting statute, 42 U.S.C. § 1988, requires that such fee awards be reasonable. The U.S. District Court for the Northern District of Georgia awarded \$6 million in attorney fees based on the lodestar method (attorney hours multiplied by prevailing market hourly rates), and a \$4.5 million fee enhancement based upon class counsel's skill, commitment, dedication, professionalism and extraordinary results achieved. The enhancement was further based on the facts that class counsel had to advance case expenses, that class counsel were not paid on an on-going basis, and that class counsel's ability to recover a fee was contingent upon the outcome of the case. The U.S. Court of Appeals for the Eleventh Circuit affirmed, but each judge wrote a separate opinion.

The U.S. Supreme Court confirmed that fee enhancements may, on rare occasions, be reasonable, but held that the award in this case was not reasonable. To be reasonable, a fee must be high enough to attract competent counsel, but not so high as to produce a windfall for attorneys. The Court held that there is a strong presumption that the lodestar method yields a reasonable fee, and that any fee enhancement cannot be based on factors already subsumed in the lodestar calculation. The Court then analyzed which factors are subsumed in the lodestar calculation, and which are properly considered as part of a fee enhancement. The Court foreshadowed the difficulty of this analysis by noting that "the lodestar figure includes most, *if not all*, of the relevant factors constituting a 'reasonable' attorney's fee . . ." *Id.* at \*2 quoting

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*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) (emphasis added).

The Supreme Court held that the results achieved by an attorney do not justify an enhancement because superior results can be the result of, *inter alia*, inferior performance by defense counsel or simple luck. On the other hand, the Court noted that there may be rare circumstances in which the lodestar calculation does not adequately account for superior lawyer performance, such as when an hourly rate is based on only one, or a few, simple factors (e.g., years of experience). Further, an enhancement may be proper when litigation involves an unanticipated and extraordinary outlay of expenses and is exceptionally protracted, or when an attorney experiences an unanticipated and exceptional delay in payment of fees. Enhancements must, the Court held, be based on objective and reviewable methods. Notably, the Court acknowledged that if hourly billing becomes less common, an alternative to the lodestar method may have to be found.

Turning to the facts at hand, the Supreme Court held that the district court did not properly justify its enhancement and that the award was largely unreviewable. The district court's error was in awarding the enhancement based on a number of factors without detailing how each contributed to the court's calculation. And to the extent that the award was based on counsel's performance, the trial court failed to employ an objective and reviewable methodology. In line with the Supreme Court's directive to use reviewable methods and calculations, the Court also held that the fee applicant has the burden of proving that an enhancement is necessary by producing *specific* evidence. Justices Anthony Kennedy and Clarence Thomas each concurred, writing separately and emphasizing that enhancements will only be proper under the rarest of circumstances.

Justice Stephen Breyer, joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Sonia Sotomayor, concurred in part and dissented in part. Justice Breyer agreed that enhancements may be proper, but argued that the Court should not have ruled on the case at bar because the Court was ill-suited for the necessary fact-intensive inquiry. He further opined that, even assuming this inquiry was proper, the district court had not abused its discretion by awarding the enhancement.

In reaching this conclusion, Justice Breyer relied on four considerations. First, he noted that this case involved an unusually important objective (reforming the state foster care system) and required an exceptional level of skill and effort. Second, the litigation was lengthy and arduous, and involved complex procedural and substantive objections. Third, despite significant obstacles, class counsel obtained an exceptional result. And fourth, Justice Breyer highlighted the district judge's praise for class counsel's exceptional performance and results.

Justice Breyer then noted that without the enhancement, the fee award in this case yielded an average hourly rate lower than that which prevailed in the relevant market. Using the majority's reasoning, Justice Breyer argued that this fact implied that the lodestar method did not adequately measure the attorneys' market value.

### **Significance of Opinion**

In a 5-4 decision, the Supreme Court has chosen to materially limit the circumstances under which attorney fee enhancements above a lodestar amount may be awarded. The Court has squarely placed the burden on plaintiffs to provide specific evidence and the district court to utilize an objective and reviewable method for any enhancement. As a practical matter, this limitation on the circumstances under which attorney fee enhancements may be awarded may prove to facilitate settlements in certain class action litigation by eliminating some of the current uncertainty about how attorney fees may be determined.

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