Fee Shifting in Federal Court Cases

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U.S. Supreme Court to Consider Whether Plaintiffs' Lawyers Are Entitled to "Just a Little Bit More" for Exceptional Performance in Fee-Shifting Cases

The Supreme Court announced on April 6 that it would hear arguments in *Perdue v. Kenny A.,* 08-970, granting a petition for *certiorari* in a case that frustrated an Eleventh Circuit judge to such an extent that it motivated him to pen his first dissenting opinion from a denial of rehearing *en banc* in his sixteen years on the bench. See *Kenny A. v. Perdue,* 547 F.3d 1319, 1332 (11th Cir. 2008) (Carnes, J., dissenting from denial of rehearing *en banc*).

In addition to his dissent from the denial of rehearing, Judge Ed Carnes wrote the opinion announcing the judgment of the original three-judge panel in a lengthy opinion issued on July 3, 2008. The original (and dispositive) opinion began with an eyebrow-raising commentary on the issue at stake in the case:

> When asked how much money would be enough for him, John D. Rockefeller reportedly said: "Just a little bit more." The attorneys for the plaintiff class in this case want more than just a little bit more. They want a lot more money than they would receive from multiplying the number of hours they worked on this case by the hourly rate they charge. And the district court gave them a lot more—$4,500,000 more—out of the pockets of the taxpayers of Georgia.

Kenny A. v. Perdue, 532 F.3d 1209, 1214 (11th Cir. 2008) (footnote omitted)).

Kenny A. was filed in the Northern District of Georgia in June 2002. The named plaintiffs brought the lawsuit on behalf of a class consisting of all children then in foster care in Georgia's Fulton and Dekalb Counties, as well as a sub-class of African American foster children in those same counties. (*Id.*). The plaintiffs alleged that they had been harmed by systemic deficiencies in the Counties' foster care systems—deficiencies so serious as to violate three federal statutes and the First, Ninth, and Fourteenth Amendment rights of the class members. (*Id.* at 1214-15).

The litigation was ultimately settled. The settlement included an acknowledgement that the plaintiffs' attorneys were entitled to recover reasonable fees pursuant to 42 U.S.C. § 1988, but the ultimate amount of the award was left up to the District Court. (*Id.* at 1216-17).

The eventual motion for fees filed by plaintiffs' counsel sought $14,342,860 in fees. (*Id.* at 1217). Only half that amount—$7,171,434.30—was compensation for the 29,908 hours the attorneys and paralegals claimed to have worked. (*Id.*). The other half "was to be an enhancement of the fee award for a job well done." (*Id.*). Although the District Court sustained a number of the defendants' objections, it still granted a 75% upward enhancement of the award on the basis of specific findings as to the quality of the representation and a variety of other related factors. (*Id.* at 1218, 1225). The total award issued by the District Court amounted to $10,522,405.08. (*Id.*).

Although several issues were raised before the Eleventh Circuit, the one that garnered the most attention (and which ultimately divided that panel) was whether the District Court abused its discretion in granting a $4,500,000 enhancement to the $6,000,000 principal award, or "lodestar amount." (*Id.* at 1220). As civil rights practitioners are well aware, the lodestar is a common term for "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." (*Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). The lodestar is more than just a handy formula used by courts adjudicating fee petitions under 42 U.S.C. § 1988; indeed, it is "the guiding light of [the Supreme Court's] fee-shifting jurisprudence." (*City of Burlington v. Dague,* 505 U.S. 557, 562 (1992)).

The dispute in *Kenny A.* was not whether the lodestar applied, but whether the District Court properly applied the lodestar. In more categorical terms, the issue was (and is) whether "a reasonable attorney's fee award under a federal fee-shifting statute [may] ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?" (Pet. for Cert. at i).

Judge Carnes plainly feels that it may not, at least not in a case like this. (See *Kenny A.,* 532 F.3d at 1226 ("Double counting simply is not allowed.")). Another judge on the Eleventh Circuit panel, Judge Charles R. Wilson, disagreed, based on his reading of pertinent Supreme Court decisions. (*Id.,* at 1242). Judge James C. Hill declined to enter the fray, finding that regardless of the correct answer, prior panel precedent within the Eleventh Circuit required affirmance of the District Court's award. (*Id.* at

1251). Judges Carnes and Wilson ultimately concluded that Judge Hill was correct: the panel was bound by prior panel precedent, and the District Court's opinion was due to be affirmed. (*Id.* at 1242). In so doing, however, Judge Carnes issued a not-so-subtle reminder that "this Court sitting *en banc,* or the Supreme Court, can overrule any prior decisions of this Court." (*Id.*).

In a subsequent order, the Eleventh Circuit, sitting *en banc,* refused rehearing, thus foreclosing that option. (See *Kenny A. v. Perdue,* 547 F.3d 1319, 1320 (11th Cir. 2008)). In response, Judge Carnes authored a dissent from the denial of rehearing setting forth the reasons the Supreme Court should clear the air. (*Id.* at 1331-39 (Carnes, J., dissenting from denial of rehearing *en banc*)). The Supreme Court accepted the invitation. *Kenny A. v. Perdue,* 547 F.3d 1319 (11th Cir. 2008), *cert. granted* (April 6, 2009) (No. 08-970).

One of the most interesting aspects of the grant of *certiorari* in this case is the absence of the traditional factors militating in favor of high court review. As Judge Wilson noted in his concurrence with the denial of rehearing *en banc,* "there is no circuit split on this issue. The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits—all of the circuits that have considered this issue—agree that a district court may provide an enhancement for exceptional performance." (*Kenny A. v. Perdue,* 547 F.3d at 1321 (Wilson, J., concurring in the denial of rehearing *en banc* (collecting cases)). </p>

This broad-based agreement among circuit courts of appeal derives principally from the reading of two prior Supreme Court fee-shifting decisions, *Blum v. Stenson,* 465 U.S. 886 (1984), and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986). As Judge Carnes reads those cases, neither answer the question presented here. *Blum,* he argues, "establishes [simply] . . . that absent **specific evidence and findings an enhancement for the quality of representation or results obtained is not permitted."** (*Kenny A. v. Perdue,* 547 F.3d at 1333 (Carnes, J., dissenting from denial of rehearing *en banc*) (emphasis supplied)). Here, of course, the District Court did make specific findings that such an enhancement was justified, so *Blum's* limitation is satisfied.

The *Delaware Valley* decision comes closer to deciding the issue in this case, but in the end seems to leave in place the same troublesome wrinkle that the Court failed to iron out in *Blum.* The Court began by stating that factors such as the quality of performance and the results obtained "are presumably fully reflected in the lodestar amount, and thus **cannot serve as independent bases for increasing the basic fee award,"** *Delaware Valley,* 478 U.S. at 565 (emphasis supplied), but then bolstered (or weakened) that position by indicating that, even if such an enhancement were permissible, there were no specific findings made by the lower courts to justify such an enhancement. (See *id.* at 567-68).

The grant of *certiorari* in this case now squarely places before the Supreme Court the issue of enhancement of a fee award based upon specific findings as to the quality of representation and extent of the success obtained. As Judge Carnes noted, "[t]his case presents the superior performance and exceptional results enhancement issue as well as any ever will because the evidence and findings in this case are as specific as any are likely to be." *Kenny A. v. Perdue,* 547 F.3d at 1335 (Carnes, J., dissenting from denial of rehearing *en banc*). The case will have implications beyond fee awards under 42 U.S.C. § 1988 in actions brought under 42 U.S.C. § 1983. Indeed, the lodestar formula governs the resolution of fee petitions under at least 100 federal fee-shifting statutes, ranging from the obscure (*e.g.,* the Hobby Protection Act, 15 U.S.C. § 2102, and the Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 911(f)) to the most prominent (*e.g.,* the Social Security Act, 42 U.S.C. § 406(b), the Clean Water Act, 33 U.S.C. § 1365(d), and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000b-1, and 2000e-5(k)).