

**ATTORNEY'S FEE SELDOM WILL BE  
GREATER THAN LODESTAR**

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In a recent case, the U.S. Supreme Court decided whether the calculation of an attorney's fee based on the "lodestar" amount, may be increased due to superior performance and results. The answer in most cases is "no."

Here is the background. Children in the Georgia foster-care system and their next friends filed a class action on behalf of 3,000 children in foster care. The suit named as defendants the Governor of Georgia and various state officials. The complaint claimed that deficiencies in the foster-care system violated plaintiffs' federal and state constitutional and statutory rights, and sought injunctive and declaratory relief, as well as attorney's fees and expenses. The parties ultimately entered into a consent decree.

The plaintiffs', respondents in the Supreme Court, submitted a request for more than \$14 million in attorney's fees. Half of that amount was based in their calculation of the lodestar—approximately 30,000 hours multiplied by hourly rates of \$200 to \$495 for attorneys and \$75 to \$150 for non-attorneys. The other half of the claimed amount represented a fee enhancement for superior work and results.

The district court awarded fees of approximately \$10.5 million, including a lodestar calculation of approximately \$6 million. The district court enhanced the award by 75%, concluding that the lodestar calculation did not take into account the facts: (1)

that class counsel were required to advance case expenses of \$1.7 million over a three-year period with no on-going reimbursement, (2) that class counsel were not paid on an on-going basis as the work was being performed, and (3) that class counsel's ability to recover fees and expense reimbursements was completely contingent on the outcome of the case.

The enhancement resulted in an additional \$4.5 million fee award. The Eleventh Circuit affirmed.

The Supreme Court first pointed out that Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced. Section 1988 provides that a prevailing party in certain civil rights actions may recover a reasonable attorney's fee as part of the costs. The Supreme Court called the lodestar figure the "guiding light" of fee-shifting jurisprudence.

Prior Supreme Court decisions have established six important rules. First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation. Second, the lodestar method provides a fee that is presumptively sufficient to achieve this objective. Third, enhancements may be awarded in "rare" and "exceptional" circumstances. Fourth, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee. The novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel. The quality of an attorney's performance generally should not be used to adjust the lodestar because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate. Fifth, the burden of

proving that an enhancement is necessary must be borne by the fee applicant. Finally, a fee applicant seeking an enhancement must produce “specific evidence” that supports the award.

According to the Supreme Court, there is a “strong presumption” that the unenhanced lodestar figure is reasonable. However, that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

The Supreme Court was asked to decide whether either the quality of an attorney’s performance or the results obtained are factors that may properly provide a basis for an enhancement. In deciding these issues, the trial court first inquires whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation. There are few such circumstances but an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney’s true market value. Thus, the district court can adjust the attorney’s hourly rate in accordance with specific proof linking the attorney’s ability to a prevailing market rate.

Second, an enhancement may be appropriate if the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. Enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. The enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Finally, there may be extraordinary circumstances which involve exceptional delay in the payment of fees. Sometimes an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

In this case, the district court did not provide proper justification for the large enhancement that it awarded. The court increased the lodestar award by 75% but, according to the Supreme Court, this figure appeared to have been “essentially arbitrary.”

While determining a reasonable attorney’s fee is a matter that is committed to the sound discretion of a trial judge, this discretion is not unlimited. It is essential that the court provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. As a public policy matter, the Supreme Court noted that in many cases, attorney’s fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers. Because state and local governments have limited budgets, money that is used to pay attorney’s fees is money that cannot be used for programs that provide vital public services.

The judgment of the Court of Appeals was reversed, and the case was remanded for further proceedings.

*Perdue, et al. v. Kenny A., et al.*, 559 U.S.\_\_\_\_\_, 130 S. Ct. 1662 (2010)