the consumer caused by such a violation; and (3) proof of the amount of damages."[4]

The court determined that the plaintiffs' putative class failed to meet Rule 23(b)(3)'s predominance requirement in four ways: (i) individual oral presentations by brokers would necessitate individualized inquiry; (ii) claims brought under HRS § 480-13 require an individualized showing of actual damages; (iii) HRS §§ 480-2 and 480-13 require a causal link between the allegations and injury; and (iv) whether the annuities were suitable for seniors required individual inquiry. In doing so, the court noted that "individual reliance—whether IAP purchasers actually relied on Midland's allegedly misleading or fraudulent publications or omissions—provides the crucial causal link between HRS § 480-2 and HRS § 480-13."[5]

The Ninth Circuit reversed and remanded in *Yokoyama II*, focusing solely on HRS § 480-2's definition of unlawful deceptive conduct and not addressing HRS § 480-13, the provision that deputizes private citizens to enforce HRS § 480-2 by obtaining damages for injuries caused by violations of HRS § 480-2. The Ninth Circuit noted that the district court "refused to certify a class in this case because it determined that Hawaii's consumer protection laws require individualized reliance showings."[6] This, the court held, "was contrary to the Hawaii Supreme Court's interpretation of state law, because the Hawaii Supreme Court has made clear that reliance is judged by an 'objective reasonable person standard.'"[7] Thus, the court held, "Hawaii's consumer protection laws look to a reasonable consumer, not the particular consumer."[8]

As a result, according to the Ninth Circuit, plaintiffs are not required to show reliance, causation, or even injury, at the class certification stage, but instead "only whether [defendant's] omissions were likely to deceive a reasonable person."[9] The court then found that, because there was no reliance requirement under Hawaii's consumer protection statute, the district court's finding that individualized damages inquiries would be necessary was also incorrect. Although "[d]amages calculations w[ould] doubtless have to be made under Hawaii's consumer protection laws," the "amount of damages is invariably an individual question and does not defeat class action treatment."[10]

The decision would constitute a major shift for a number of reasons. Apparently, *no class member*, not even the named plaintiffs, is required to establish that he or she

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Supreme Court to Clarify Rules for Multiplying Attorneys' Fees

by Gregory F. Jacob

More than twenty years ago, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ("*Delaware Valley I*"),[1] the Supreme Court opined that the federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys."[2] In *Kenny A. v. Perdue*,[3] the Court has the opportunity to revisit this earlier pronouncement by deciding when, if ever, a trial court is permitted to grant a successful plaintiff's attorney a discretionary multiplier of the standard attorney's fees award. Typically, a plaintiff's attorney who wins a case that is subject to a federal fee-shifting statute receives a "lodestar" fee award, which is calculated by multiplying the attorney's reasonable hourly rate by the number of hours the attorney reasonably expended on the case. The prevailing attorneys, of course, would like to receive more fees if they could, and every once in a while they succeed in talking a duly impressed or otherwise sympathetic court into increasing the fee award, usually by employing a "lodestar multiplier."

In the Eleventh Circuit's *Kenny A.* ruling, at least one judge (Judge Carnes) determined that governing Supreme Court precedent interpreting federal fee-shifting statutes does not permit a district court to award prevailing attorneys a lodestar multiplier based on the quality of their performance or the results they obtained. The panel unanimously ruled, however, that binding Eleventh Circuit precedent, handed down subsequent to the governing Supreme Court precedents, compelled the panel to allow precisely such an award. And so it did, affirming a 1.75 lodestar multiplier that cost Georgia taxpayers an additional $4.5 million in attorney's fees. Judge Carnes, however, argued in his separate opinion that the Eleventh Circuit should take the case en banc so that it could reverse its earlier precedents allowing such awards. When the court declined,[4] he issued what he described as his first dissent from a denial of rehearing en banc in his sixteen years on the bench, appealing to a yet higher authority to step in and set his circuit straight.[5] And it just may have worked. The Supreme Court granted certiorari, and argument was heard in the case on October 14, 2009.

1. What's in a Lodestar?

According to Black's Law Dictionary, the term "lodestar" originated in England sometime in the 14th Century.[6] King Edward I reigned in England then, and while anyone who has seen the movie "Braveheart" can attest that Edward may have committed a civil rights violation or two in his time, it is difficult to envision some enterprising medieval barrister suing the crown and then seeking fee reimbursement from the royal treasury for his troubles. No, times were simpler then: the Geneva Conventions had not yet been dreamed of; Longshanks had an official Castle Torturer on staff at the appropriately named Chillingham Castle; there was no organized plaintiff's bar around to fight the powers-that-be (or, more to the point, to find a way to get their fees *multiplied*); and "lodestar" was an innocent astronomical term that meant nothing more than a guiding light in the sky.

The term began to take on new meaning, though, when courts found themselves confronted with the difficult question of how to determine the reasonable value of a plaintiff's attorney's services when applicable law requires that the attorney's fees be shifted to a losing defendant. There is no immediately obvious answer. For example, plaintiff's attorneys often work on a contingency basis whereby they receive a percentage of the total damages awarded to their client. Cases that are subject to federal fee-shifting statutes, however, frequently seek primarily non-monetary relief, to which a contingency fee cannot readily be applied.

Eventually a majority of courts settled on the notion that plaintiff's attorneys who do work subject to fee-shifting statutes should get paid more or less like the rest of us: figure out how many hours they worked (or reasonably should have worked), and multiply that by the hourly rate they charged (or reasonably should have charged), and that's the presumptive fee award—the "lodestar." Without using the term "lodestar," the Supreme Court adopted this fee calculation methodology for all federal fee-shifting statutes in *Hensley v. Eckerhart*.[7]

Calculating the appropriate lodestar fee award sounds a lot simpler than it is in practice. The key complicating factor is the one found in the parentheticals: "reasonably should have." It must be remembered that what it is really going on here is that the prevailing attorneys are applying to the court *for their own fee award*. Judges, being intimately familiar with the stock from which they were drawn, decided early on that they couldn't just take the lawyers' word for it. So a twelve-factor test, originally judge-made but then endorsed by Congress in the legislative history of a key federal civil rights fee-shifting statute, is applied to determine the "reasonable" number of hours worked and the "reasonable" hourly rate. The twelve factors are:

(1) time and labor required;

(2) novelty and difficulty of the questions;

(3) skill requisite to perform the legal service properly;

(4) preclusion of other employment by the attorney due to acceptance of the case;

(5) customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) amount involved and the results obtained;

(9) experience, reputation and ability of the attorneys;

(10) "undesirability" of the case;

(11) nature and length of the professional relationship with the client; and

(12) awards in similar cases.[8]

2. Adjusting the Lodestar: Clash of the Governing Case Law

Even after the twelve factors have been applied and a final lodestar amount has been arrived at, a court's work is not necessarily done. As the Court explained in *Hensley*, "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'"[9] The question presented in *Kenny A.* is whether an upward adjustment can *ever* be made by a district court based on the quality of the prevailing attorneys' performance and the value of the results obtained. The answer to that question will depend on which strain of arguably conflicting prior pronouncements the Court elects to follow.

As a starting point, it is clear that the governing language from *Hensley* contemplates upward adjustments of the lodestar under some circumstances. Moreover, the *Hensley* court opined in dicta that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, *and indeed in some cases of exceptional success an enhanced award may be justified*."[10]

The next term, in *Blum v. Stenson*,[11] the Court had the opportunity to examine the enhancement factors that are at issue in *Kenny A.*. The Court opined that quality of representation "may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"[12] With respects to the results obtained, the Court stated that "it normally should not provide an independent basis for increasing the fee award."[13] Advocates of lodestar multipliers point to the fact that *Blum* suggested an upward adjustment for the quality of representation "may" be justified in exceptional cases, and further note that while *Blum* stated that an upward adjustment for the results obtained is not "normally" permissible, the Court's use of the term "normally" suggests that in exceptional cases, at least, it is permissible.

Opponents of lodestar multipliers discard these stray statements as dicta and focus instead on the Court's post-*Hensley* holdings concerning upward adjustments. *Blum* itself rejected a 1.5 lodestar multiplier that had been based on "the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit to the large class that was achieved."[14] In rejecting the use of the quality of representation and the results obtained as justification for an upward adjustment of the lodestar amount in the case before it, the Court noted that both factors were already expressly accounted for in the twelve-factor lodestar test, and thus should have been reflected in the number of hours and hourly rate deemed "reasonable" by the court. To apply those same factors a second time to justify an upward adjustment after the lodestar amount was already calculated, the Court suggested, would be impermissible double counting.

The Court followed this same line of reasoning in *Delaware Valley I* in rejecting a district court's upward adjustment of the lodestar amount that was based on, among other things, the quality of representation and the results obtained. The Court cautioned that district courts should apply a "strong presumption" that the initial lodestar calculation represents a reasonable fee,[15] and noted that the factors relied on by the district court to grant an upward adjustment in the case before it "are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award."[16] The Court's supporting reasoning is instructive:

> [W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensated the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.[17]

Finally, in *City of Burlington v. Dague*,[18] the Court ruled that district courts cannot "enhance the fee award above the 'lodestar' amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of no payment at all for their services."[19] The Court noted that "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits."[20] The Court stated that the legal and factual merits of the claim are irrelevant to the fee award, and noted that the difficulty of establishing the merits should be reflected "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[21]

Dague was the Supreme Court's last significant pronouncement on the subject. Thus, the above summary represents the slate on which the Supreme Court now prepares to write.

3. Competing Policy Concerns

When Congress used the term "reasonable" to describe the fee that should be awarded in fee-shifting cases, it necessarily left a great deal of discretion to the courts in fashioning how that term would be applied. The string of cases striking down upward adjustments of lodestar awards reflects the gut reaction of many Court members that it is fundamentally unfair to first count factors such as quality of performance and the result obtained in calculating the lodestar amount, and then to use those same factors again in deciding whether to apply a lodestar multiplier. It also reflects

the Court's awareness that the fees awarded in civil rights cases are paid by the government, and thus ultimately by the taxpayers. As Judge Carnes wryly noted in his *Kenny A.* panel opinion, while there was no question that the plaintiff's attorneys involved in that case had obtained significant and important relief for foster children in Georgia, the $4.5 million fee enhancement would actually leave less money in the state's coffers to provide the needed relief.

There is also clearly a sense among some of the Justices that because upward adjustments for performance and results in courts today are both exceptional and rare, they are also effectively standardless and random. In *Kenny A.*, the judge granting the 1.75 multiplier noted that "[q]uite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[22] But as the Chief Justice inquired during oral argument, if that is the standard for granting a multiplier, how is a first-year judge supposed to know whether an upward adjustment is appropriate? If lodestar multipliers strike like lightning and ultimately significantly depend on the personality of the judge, that does not seem like a particularly fair or coherent system for transferring millions of dollars from taxpayers to plaintiff's attorneys.

On the other hand, there are significant policy arguments that counsel in favor of upward adjustments. The purpose of the federal fee shifting statutes is to induce private attorneys to take on cases that Congress has deemed worthy of representation because important interests and rights are at stake. Obviously, the higher the fees awarded in such cases, the more likely it is that competent counsel will agree to take them. While it is impossible to know whether the current system provides the optimal amount of representation, it can be said with some certainty that it systematically undercompensates plaintiff's attorneys for their fee-shifting work vis-à-vis the compensation they receive when their fees are paid by their clients. If they lose, they get nothing. If they obtain only partial relief for their clients, the courts frequently adjust the lodestar calculation *downward*, sometimes significantly.[23] And when they win big, while it is true that the base lodestar amount typically fully compensates them for the time and expense of litigating that particular case, it does not build in any margin (as contingency fees typically do) that accounts for the fact that other cases, some of them very expensive, will be lost.

A rational policy analysis will analyze what constitutes a "reasonable" fee based not only on a gut determination of fairness in a particular case, but also in the light of what is necessary to achieve an optimal level of fee-shifting representation across many cases. Is it "reasonable" to account for the quality of representation and the results obtained twice in setting a fee award—both when setting the lodestar amount and again when considering whether to grant an upward adjustment? That doesn't seem quite right. But is it "reasonable" to pay prevailing attorneys at a rate that does not adequately take into account the risks they bore in litigating the case? That doesn't seem right either. *Dague* definitively foreclosed consideration by the courts of the contingency risk borne by a prevailing attorney, thus forcing the *Kenny A.* respondents and their amici supporters to dance around the real underlying policy issue. Justice Sotomayor understood the game, and suggested at oral argument that *Dague* was wrongly decided and should be overruled.

Even if it were determined that the current system does not sufficiently incentivize plaintiff's attorney to take on cases that are both meritorious and important, however, is it really a rational solution to that problem to tack a jurisprudential "prevailing party" lottery ticket onto initial lodestar calculations, which when granted boosts fees tremendously, but which in fact is seldom granted and depends greatly on the personality of the trial judge? Will the prospect of such a lottery win truly attract substantially more competent counsel? The contours of the Supreme Court's past fee-shifting jurisprudence may have placed the Court in a box in which a coherent and rational approach to these problems is impossible without adjustment of the guiding parameters.

4. No Predictions Possible

The oral argument in *Kenny A.* made no definitive revelations about what the final disposition of the case is likely to be. Justices Stevens, Ginsburg, and Sotomayor seemed to favor the availability of fee multipliers, while the Chief Justice and Justices Alito and Scalia seemed opposed. Justices Kennedy and Breyer seemed to telegraph that they had not yet made up their minds, with Justice Kennedy perhaps leaning in favor of allowing fee multipliers and Justice Breyer perhaps leaning against. Justice Thomas asked no questions. Whichever way the Court goes, let us hope that the Court seizes the golden opportunity that *Kenny A.* provides to revisit its past jurisprudence and to tie up a more rational and internally consistent fee-shifting paradigm with a bow.

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Endnotes

1 478 U.S. 546 (1986).

2 *Id.* at 565.

3 532 F.3d 1209 (11th Cir. 2008).

4 *Id.* (reflecting a 9-3 vote against rehearing en banc).

5 Judge Carnes noted that the lodestar multiplier issue affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party," and that "[t]he record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can." *Id*. at 1337.

6 Black's Law Dictionary 1026 (Bryan A. Garner, ed., 9th ed. 2009).

7 461 U.S. 424 (1983).

8 *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 91-94 (1989); H.R. Rep. No. 94-1558, p. 8 (1976); S. Rep. No. 94-1011, p. 6 (1976).

9 *Hensley*, 461 U.S. at 434.

10 *Id.* at 435 (emphasis added).

11 465 U.S. 886 (1984).

12 *Id.* at 899.

13 *Id*. at 900.

14 *Id.* at 891.

15 Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

16 *Id.*

17 *Id.* at 565-566.

18 505 U.S. 557 (1992).

19 *Id.* at 559.

20 *Id.* at 562.

21 *Id.* at 563.

22 Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d at 1260, 1268-69 (N.D. Ga. 2006).

23 *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

Dukes v. Wal-Mart and Statistical Proof in Class Certification Proceedings

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en banc hearing vacates prior appellate rulings.) That no opinion has yet issued suggests continuing debate within the appellate court. It remains to be seen what path the Ninth Circuit ultimately will take, and if the path will end there or continue to the U.S. Supreme Court.

One of the most significant issues the Ninth Circuit needs to resolve is the proper role for statistical or scientific evidence at the class certification stage.[2] The legal standard remains undefined; a district court must undertake a "rigorous analysis" to determine whether each element of class certification has been established.[3] Some federal appellate courts have rejected classes when an overall review of the statistical or scientific evidence shows that plaintiffs have not met their burden. In the Second Circuit, for example, district courts have been directed to resolve factual disputes relating to the elements of certification; they may not accept plaintiffs' experts without question if the defendant challenges them with its own expert testimony.[4] The Fourth and Fifth Circuits similarly hold that plaintiffs' experts may be rejected if they do not satisfy the usual strict standards (such as under *Daubert*[5]) for admissibility of scientific or technical opinions.[6] The Third Circuit recently joined these other appellate courts in requiring careful review of both the plaintiffs' and the defendants' statistical and scientific evidence at the class certification stage, and further requiring the district court to resolve any factual disputes between the parties that relate to the certification elements.[7]

Historically in the Ninth Circuit, however, the level of "rigor" in class certification analysis has not, as a practical matter, been substantial. A legal test stated by the *Dukes* panel is simply whether the plaintiffs have presented any "properly-analyzed, scientifically reliable evidence tending to show that a common question of fact… exists."[8] The panel's "tending to show" language suggests that so long as the plaintiffs' evidence tends to speak in favor of class certification, the defendants' countervailing evidence should be disregarded (or at least weighted much less heavily). This is a more pro-plaintiff standard than other appellate courts apply.