

**WILL PERDUE V. KENNY HAVE ANY IMPACT ON  
COMMON-FUND CLASS ACTIONS?**

The recent U.S. Supreme Court case of *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (Apr. 21, 2010), contains very strong language regarding the limits on fees that can be awarded in class actions. The question that many practitioners have asked is whether this case is the harbinger of future reductions in fee awards in all class actions or a restatement of the particularly restrictive rules that have historically governed fee-shifting class actions.

A close analysis of *Perdue* would appear to indicate that the ruling is limited to federal fee-shifting statutes and that it will have no impact on common-fund class actions.

*Perdue* involved a claim for attorney fees in a civil rights action. Specifically, the claimants sued under 42 U.S.C. § 1983 on behalf of foster children in two Georgia counties, alleging that state and local agencies entirely mismanaged the foster care system, resulting in inadequate care.

The claimants prevailed in the action and obtained a consent decree. They then sought recovery of attorney fees and costs. The court awarded their counsel \$10.5 million in fees, which included a 1.75 enhancement multiplier based upon the inherent risks of handling the case on a contingency basis and the excellent results achieved.

The Supreme Court granted review to decide whether “the calculation of an attorney’s fee, under federal fee-shifting statutes, based on the ‘lodestar,’ ... may be increased due to superior performance and results.”

In response to this question, the high court unanimously ruled that such enhancements were not proper in attorney fee requests in federal fee-shifting class actions.

Some practitioners contend that the Supreme Court’s limited ruling regarding multipliers will be extended to all class actions. A close examination of this decision reveals that such an extension would not be supported by *Perdue* or other Supreme Court precedents.

As the high court expressly recognized in *Perdue*, it has historically ruled that multipliers are to be rarely applied in fee-shifting cases. In *Burlington v. Dague*, 505 U.S. 557, 562 (1992), the court held that a fee award could not be enhanced to account for the contingency risk.

“[J]ust as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost ... so should it bar a prevailing plaintiff from recovering for the risk of loss,” the *Burlington* court held. “To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney’s time (or anticipated time) in cases where his client does not prevail.”

In *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 556 (1986), the court held that section 304(d) of the Clean Air Act, as well as other fee shifting statutes such as the Civil Rights Act, 42 U.S.C. § 1988, was not designed to provide “a form of economic relief to improve the financial lot of attorneys.”

The court in *Perdue* emphasized that “in many cases,” the attorney fees paid under Section 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees will effectively be paid by state and local governments from limited funds that otherwise would “be used for programs that provide vital public services.” *Perdue*, 130 S. Ct. at 1677.

The purpose behind the award of fees in statutory fee-shifting cases is to “induce a capable attorney to undertake the representation of a meritorious civil rights case.” *Id.* at 1672. The court reasoned, based on a long line of cases, that a lodestar fee without enhancements is sufficient to achieve this objective. Thus, issues of risk, novelty of the case, results achieved or the quality of the services performed are generally not to be considered in determining a fee for fee-shifting cases.

In the months following the release of the *Perdue* opinion, a number of district courts addressed the issue of whether the ruling has any application in non-statutory fee-shifting class actions. Those courts have largely ruled that *Perdue* has no application in determining the reasonable fee in common-fund class actions. *Klein v. O’Neal Inc.*, 705 F. Supp. 2d 632 (N.D. Tex. Apr. 9, 2010); *Lambrecht v. Taurel*, 2010 WL 2985946 (S.D. Ind. June 8, 2010).

Indeed, this position is consistent with appellate courts that have ruled that “when a court must decide whether to compensate attorneys for the risks they incurred in undertaking the litigation, the difference between fee-shifting and common-fund arrangements is quite significant.” *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. Oct. 14, 1988).

The rationale for the distinction between common-fund and statutory fee-shifting cases lies in the individual who will be paying the fee. “In a common-fund case, ... because compensation for risk is charged against the plaintiff class ... there is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class’s case without any assurance of compensation.” *Florin v. Nationsbank of Ga.*, 34 F.3d 560, 565 (7th Cir. 1994).

Since class members ostensibly pay for the fee from the common-fund recovery, the lodestar (standing alone) often provides insufficient compensation to class counsel for the risks undertaken at the inception of the litigation. *Cook v. Neidert*, 142 F.3d 1004, 1015 (7th Cir. 1998). *Cook* notes that an unenhanced lodestar fails to reflect “the fact that at the outset of the litigation, no matter how dazzling the array of legal talent or how many hours will eventually be logged, there is nonetheless the possibility of no recovery.”

This primary difference between common-fund and statutory fee-shifting class actions renders *Perdue* largely inapplicable to common-fund class actions.

Practically, if multipliers were not readily available in common-fund class actions, it would probably result in the end of class actions as we know them. Statistically, less than half of class actions result in a settlement or a favorable judgment for the class members. Without the multiplier, there would be no financial incentives for attorneys to bring class actions.

That would run directly counter to the historic public policy that recognizes the importance of class actions in our judicial system. “The policy at the very core of the class-action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” See, e.g., *Amchem Prods. v. Winsor*, 521 U.S. 591, 617 (1997).

Thus, it appears that *Perdue* will not be applied to non-statutory fee-shifting class actions, and the multiplier will be readily available to district court judges when determining fees for class counsel in those cases.