

## **Ninth Circuit Slashes Exorbitant Attorney's Fee Award That Would "Make the Average Person Shake Her Head in Disbelief"**

Article By:

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The Ninth Circuit recently struck a blow against plaintiffs' attorneys' ability to recover handsome attorney's fee awards in class action settlements when there is little actual benefit to the class. In [\*Lowery v Rhapsody International, Inc.\*, No. 22-15162 \(9<sup>th</sup> Cir. June 7, 2023\)](#), a Ninth Circuit panel reversed the U.S. District Court for the Northern District of California's award of \$1.7 million in attorney's fees to plaintiffs' counsel in a copyright class action, finding that the fee award was not reasonable when compared to the class' actual recovery of \$52,841, without any injunctive relief.

In 2016, a putative class of music copyright-holders filed suit against Rhapsody International, a musical streaming platform, for copyright infringement. Rhapsody International and the putative class agreed to a settlement, with a cap of \$20 million for class recovery. However, many of the putative class members were barred from recovery, as Rhapsody International had settled with the National Music Publishers Association ("NMPA") prior to settling with the *Lowery* class. As most of the putative class members could not recover due to Rhapsody International's prior settlement with the NMPA, qualified class members submitted claims totaling only \$52,841.

Despite this minimal settlement recovery, plaintiffs' attorneys requested over \$6 million in attorneys' fees (a \$2.1 million lodestar with a 2.87 multiplier). When this request was reviewed at the district court level, the magistrate judge reduced the lodestar to \$1.7 million and applied a negative .5 multiplier due to the minor benefit ultimately received by the class, which would result in an award of \$850,000 in attorney's fees. In reviewing the magistrate judge's determination, the trial judge rejected the magistrate's addition of negative multiplier but accepted the magistrate's lodestar calculation of \$1.7 million and awarded that amount in attorneys' fees. Defendant appealed.

The Court of Appeal reversed the district court's ruling, concluding that the award of \$1.7 million—an amount more than 30 times larger than the "measly" actual benefit received by the class—was not reasonable. The court applied *Kim v Allison*, holding that when calculating attorney's fees, the award must be based on the *actual* or *realistically anticipated* benefit to the class, not an "illusory" maximum or hypothetical amount. *Id.* at 10-12 (quoting *Kim v. Allison*, 8 F.4th 1170, 1181-82 (9th Cir. 2021)). In *Kim*, the Ninth Circuit found that the district court should have based its fee award on the likely claims rate based on claims submitted as of final approval, instead of the maximum payable amount of \$6 million. *Id.*

Further, the court reasoned that whether the district court chooses to apply the “percentage-of-recovery” method or the “lodestar” method in calculating attorney’s fees, the result of either method should be cross-checked against the class’ recovery in determining the final fee award. The percentage-of-recovery method sets attorney’s fees at a certain percentage —usually 25%—of either the total settlement value or the value of class member claims, while the lodestar method involves multiplying the hours spent by a reasonable hourly rate. A court can choose to adjust the fee amount arrived at using either method. Here, the Ninth Circuit held that the district court “should disregard the theoretical \$20 million settlement cap and instead start with the \$52,841.05 that the class claimed.” Cross-checking against the lodestar method, the trial court should take a “hard and probing look” at attorneys’ fee amounts above 25% percent, and unless there is “meaningful nonmonetary relief,” attorneys’ fees should rarely be more than the total amount actually recovered by the class.

*Lowery* represents a step forward in requiring a realistic assessment of the actual benefit received by the class in evaluating the fairness of plaintiffs’ attorneys’ fee awards. Without meaningful injunctive relief, it is unlikely courts within the Ninth Circuit will be receptive to claims for large fee awards where evidence of the actual claim rate as of final approval shows a low total value of claims submitted, notwithstanding a theoretical large dollar cap. A petition for rehearing *en banc* was filed June 21, 2023. We will continue monitoring this case for further developments.

*Ce-Lai Powell Fong, a summer associate, also contributed to this article.*

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